Supreme Court, U.S.
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No. 99-363

IN THE
SUPREME COURT OF THE UNITED STATES

MARTHA ROBI

Petitioner,

v.

HERBERT REED, JOHN VILLANO,
J.P. PRODUCTIONS

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

A. RESPONDENTS, Herbert Reed ("REED"), John Villano, and J. P. Productions, ("RESPONDENTS"), oppose Martha Robi's ("ROBI or PETITIONER") Petition for a Writ of Certiorari, and present three (3) issues in opposition:

1. RESPONDENTS' first assert that "...Robi's statement of the case ... is replete with misstatements ... (and) relies extensively on matters ... that were not properly before the District Court or the Court of Appeals ... thus cannot be considered by this Court...." (OPP. at 2.) Particularly, RESPONDENTS assert that eleven (11) "...(Appendices) F, K, L, M, N ,O, Q, R, U, BB and CC ... are not properly before this Court..." (OPP. at 2);[1]

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[1] ROBI's initial ten (10) paragraph Statement of the Case (at 3-10), for the most part, consists of specific quoted language of Appellate, District Court and State Court decisions which provides the judicial history of "The Platters" litigation. RESPONDENTS do not contend that ROBI's specific adoption of judicial findings is inaccurate, nor do RESPONDENTS, in their many objections, specifically identify any "misstatements." The essence of RESPONDENTS' objection is that ROBI is precluded from presenting certain factual statements (correct or not), in that certain Appendices which provide the basis of ROBI's Statement are not properly before this Court.

RESPONDENTS repeat their assertion that ROBI improperly references eleven (11) Appendices on thirteen (13) occasions, at pages 2, 4, 5, 7, 8, 9, 10, 11, 12, 13 (note 7 and note 8), 15, 16 and at 17 of the Opposition). "...None of Robi's post-judgment motions were properly before the Court of Appeals ... "Robi requested the District Court to take judicial notice of certain documents.... The District Court denied the Request, Robi did not appeal from that denial.... (OPP. at 8.) Many of the factual assertions appear in ... exhibits that were filed late ... the District Court refused reconsideration. Robi did not challenge that ruling in the Court of Appeals.... (OPP. at 9.) (Emphasis added.) "Robi's opposition to summary judgment cited ... five (5) exhibits, only two are included in Robi's Appendix APP. G and P...." (OPP. at 10.) APP. K was not in the record.... (Note 7 at 13.) The April 1, 1975

2. RESPONDENTS next assert that her "...(claim) Preclusion issue ... was not raised in Robi's opening brief before the Court of Appeals...." (OPP. at 16.)[2]

3. Finally, RESPONDENTS contend that: "...(ROBI's) petition for a writ ... does not involve an important federal question that conflicts with a decision by a state court of last resort ... or requires the Court's exercise of its supervisory power...." (OPP. at 1-2.)

B. In Reply, ROBI demonstrates:

1. First, that all elements of ROBI's "Statement of the Case," and all Appendices, were properly before the Ninth Circuit, and are therefore properly before this Court;

2. Second, ROBI demonstrates that her Opening

Agreement (APP. Q) is not signed by all the purported parties.... (RESPONDENTS' attorney admits otherwise before the District Court of N.Y., APP. J at 142a.) The District Court refused to take Judicial Notice of it. (Note 8 at 13.)

[2] ROBI's "(claim) Preclusion issue" asserts the Nevada District Court as required by the holding in Paul Robi, et al. v. Five Platters, Inc. 838 F.2d 318 (APP. E at 26a., at 47a), must give claim preclusive effect to the Florida D.C. of May 5, 1997 Order (APP. L at 99a), denying REED offensive collateral estoppel of the then-favorable Robi decisions (APP. F at 55a, APP. H at 73a) and thereafter on December 17, 1987 (APP. K at 95a), dismissing REED's claims against FPI with prejudice. That the 1987 Florida District Court decisions (APP. K at 95a, APP. L at 99a) preclude REED ten (10) years later, in 1997, from seeking the benefit of the same prior Robi decisions (APP. F at 55a, APP. H at 73a) before the Nevada District Court, which request the Florida District Court denied to REED in 1987.

ROBI's appears Pro Se (Note 1 at 1 of OPP), in that her attorney was not admitted before this Court as of August 26, 1999, the deadline date for the filing of ROBI's Petition. Subsequently, ROBI's attorney has applied for admission, and PETITIONER will then substitute her attorney upon his admission to this Court.

Brief before the Ninth Circuit (APP. II at 240a, at 241a, para 26, and at 249a) did directly assert issues of "claim preclusion" as to both the May 27, 1987 Florida District Court's Order denying REED's request for collateral estoppel against FPI (APP. L at 99a), and the Florida District Court December 10, 1987 Order of dismissal with prejudice (APP. K at 95a);

3. And finally, ROBI's Petition not only demonstrates that the exercise of this Court's supervisory power is appropriate, but, by its own holding, the Ninth Circuit's decision itself (APP. A at 1a) specifically identifies important federal questions: "Neither the Supreme Court nor the Ninth Circuit has directly discussed the status of a trademark for the name of musical groups ... when one of its members departs..." (APP. A at 6a); "This holding is consistent with the basic purposes of trademark law and the Lanham Act" (APP. A at 9a). By purportedly rendering both state partnership, and state contract law inapplicable to issues involving relationships between members of music performing groups as to ownership of the group's goodwill in its name (subsuming those issues under the Lanham Act), the Circuit Court decision (APP. A at 1a) renders inoperative not just one (1) California State Supreme Court decision, but the entire doctrine of California State Court Partnership Law (and that of the other forty-nine (49) states as well). The Circuit Court decision (APP. A at 1a) therefore does raise issues which are subject to this Court's review under Rule 10(a).

APPENDICES F, K, L, M, N, O, Q, R, U, BB AND CC ARE PROPERLY BEFORE THIS COURT

C. On March 3, 1998, ROBI submitted to the Ninth Circuit both her Opening Brief (APP. II at 240a), and her five (5) volumes of "Excerpts of the Record" (Index of ROBI's Excerpts is presented at APP. MM at 284a to 315a)[3]. At the

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[3] As a result of RESPONDENTS' objection, PETITIONER's Reply augmented her Appendix (now including Appendices DD to MM). APP. MM, commencing at 284a, includes the index of ROBI's Excerpts of the Record, as submitted to the Ninth Circuit, which specifically includes the eleven (11) questioned Appendices. APP. F is found at Tab No. 138 at APP. MM at 315a. APP. K is

time of ROBI's submission, FRAP Rule 10(e)(1) provides RESPONDENTS the opportunity to assert "...any difference ... about whether the record truly discloses what occurred in the District Court..." and FRCP Rule 10(e)(1) also provides RESPONDENTS the opportunity and obligation to have any "...difference(s) ... submitted ... and settled by that (District) Court and the record conformed accordingly."

D. As well, after ROBI's March 3, 1998 submission of her Brief (APP. II at 240a) and Excerpts (APP. MM at 248a to 316a) to the Circuit, then, as provided by FRAP 27 and Ninth Circuit Rules 27-1 and 30-2(a), RESPONDENTS had a second opportunity to object to ROBI's Brief (APP. II at 240a) and/or PETITIONER's Excerpts (Index, APP. MM at 284a to 315a) by filing a motion directing the Circuit Court to strike portions of ROBI's Excerpts of the Record, or her Opening Brief.[4] RESPONDENTS' had available to them a FRAP

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found at Tab No. 126 at APP. MM 312a. APP. L is found at Tab No. 138 at APP. MM at 315a. APP. M, the 3/21/55 Recording Agreement, is found at Tab No. 34 at APP. M at 291a. APP. N, the photograph of "The Platters" is found at Tab No. 8 at APP. MM at 285a. APP. O, the January 1966 "The Platters," Paul Robi, Zola Taylor and Tony Williams (independent of the FPI and REED), is found at Tab No. 18 at APP. MM at 288a. APP. Q is found at Tab No. 128 at APP. MM at 313a. APP. R, FPI bankruptcy which indicates FPI's license of the trademark "The Platters" to REED, is found Tab No. 118 at APP. MM at 310a. APP. U, the California June 28, 1996, District Court Order, indicating a questions remain whether FPI has lost its rights, is found at Tab No. 109 at APP. MM at 308a. APP. BB, the Paul to Martha Robi Assignment, is found at Tab No. 66 at APP. MM at 299a. APP. CC, the July 12, 1968 letter from REED, asserting rights on behalf of the corporation as against Zola Taylor and ROBI, is found at Tab No. 33 at APP. MM at 291a.

[4] If the excerpts of the record contain unauthorized documents or matters that were not part of the District Court record, the remedy is a motion to strike the offending material. Kirshner v. Uniden Corp. of America 842 F2d 1074, 1087 (9th Cir., 1988, Circuit Rule 30-2 (a)). A Motion to Strike a portion of the record or a brief based upon the fact that the matters submitted are not properly within the appellate record must be made by motion separate from the

10(e)(1) motion or a motion to strike. On May 14, 1996, four (4) months prior to RESPONDENTS' September 18, 1996, submission of its Summary Judgment Motion (APP. W at 181a),[5] the District Court had held a one (1) day preliminary injunction evidentiary hearing when the District Court admitted into evidence over one hundred (100) exhibits (Tabs Nos. 8 through 77, Excerpts, APP. MM 285a to 300a), to which evidence REED, ROBI and the District Court itself all made reference at times without specificity to precise exhibit numbers.[6] RESPONDENTS filed no objection to, or request to strike, ROBI's Excerpts of the Record (APP. MM at 285a through 316a) or Opening Brief (APP. II at 240a). Appellant's Opening Brief (selected pages, APP. II at 240a) references each of these eleven (11) Appendices to which RESPONDENTS object.

E. PETITIONER further addresses RESPONDENTS' objections to specific Appendices:

1. RESPONDENTS assert: "...items ... BB ... were not part of the summary judgment record and ... are not properly before this Court." (OPP. at 2.)[7]

2. Yet, the District Court's Summary Judgment

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requesting party's brief. In re Pace, 56 F.3d 1170, 1177 Note 10 (9th Cir., 1995) referencing FRAP 27 (a) and Circuit Rule 27 (1): "...In his brief, Taxel asked us to strike the Special Addenda appended to the Appellants' opening brief and urged us to disregard all assertions contained therein. Taxel's request falls short of the requirements of Fed.R.App.P. 27 and 9th Cir.R. 27-1, and is accordingly denied." (Note 10, In re Pace, supra.)

[5] Appendix W identifies its incorrect date as 9/18/94 as opposed to 9/18/96.

[6] Opposition to this Court at 11, at note 6, provides an example of this practice, "Robi's testimony was referenced by Reed." (OPP. at 11 note 6.)

[7] Appendix BB at 206a is the November 9, 1988 Paul Robi to Martha Robi Assignment of Trademark.

Order (Appendix C at 14a), references (APP. BB at 206a) and finds "...Prior to his death in 1989, Paul assigned his right to the use of the mark to Robi...," and the Ninth Circuit (Decision APP. A at 1a) on two (2) occasions specifically references (APP. BB at 208a): "...Hence the Court held the purported assignment of this right to Martha Robi was invalid...." (APP. A at 2a.) "...In November of 1988, Paul Robi executed a written "assignment of trademark" ostensibly transferring to Martha Robi all of his rights in the Platters mark" (APP. A at 4a).[8]

F. ROBI's Statements of Facts at Issue (APP. X at 185a) and her Opposition to Summary Judgment (selected pages, APP. KK at 265a to 272a) reference sixteen (16) preliminary injunction exhibits, including three (3) to which REED objects.[9]

G. RESPONDENTS' objection to APP. F, the May 22, 1985 California District Court Order dismissing FPI's lawsuit against Paul Robi, (APP. F at 55a) and APP. L, the May 15, 1987 Florida District Court Order denying REED's Motion requesting offensive collateral estoppel based upon the favorable Robi Orders against FPI (APP. L at 99a), ROBI specifically requested the Circuit Court to take judicial notice of Appendices F (APP. F at 55a) and L (APP. L at 99a) on December 9, 1997. RESPONDENTS did not object. By Order of January 26, 1998 (APP. B at 11a), the Ninth Circuit granted ROBI's Request to Take Judicial Notice of APP. F and L.

H. PETITIONER's October 1, 1997 Notice of

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[8] RESPONDENTS' own Summary Judgment Memorandum before the District Court, refers to the Paul-Martha Robi November 9, 1988 Assignment: "...Because Paul Robi is deceased ... Martha Robi cannot rely on the purported Assignment of trademark ... the supposed assignment is invalid." (APP. LL at 282a.)

[9] Among them, Tabs 18 (APP. N at 10a), 34 (APP. M at 101a), 66 (APP. BB at 206a), all admitted into evidence at the Preliminary Injunction hearing, and included in the Appendix on Appeal without objections by REED.

Appeal (APP. EE at 220a (para. ii)) specifically appeals the District Court Order denying ROBI's "Request to Take Judicial Notice" of APP. R. RESPONDENTS' objections to APPS. F, L, M, N, O, R, U, BB and CC (OPP. at 2) are clearly without merit.

I. RESPONDENTS have clearly placed APP. K at issue (APP. K at 95a) before both the District Court, and before the Court of Appeals by reference to this very document in RESPONDENTS' Motion for Summary Judgment (REED's Memorandum, APP. LL at 283a, note 10): "Under the November 1987 Settlement Agreement between the Five Platters, Inc., and Herb Reed, he conditionally agreed not to use the name `The Platters' by itself...." (APP. LL at 284a).[10] Remarkably, RESPONDENTS' own "Statement of the Case" in their Opposition before this Court (OPP. at 13) specifically references APP. K. "Earlier in 1987, FPI and REED had settled a suit in the Southern District of Florida." (OPP at 13.)[11] The entirety of RESPONDENTS' objections to PETITIONER's Appendices are without merit.

PETITIONER PRESENTED THE CLAIM PRECLUSION ISSUE AS TO THE REED-FPI FLORIDA LITIGATION IN PETITIONER'S OPENING BRIEF

Contrary to RESPONDENTS' assertion (OPP. at 16), PETITIONER's Opening Brief (APP. II at 240a, selected pages) asserts: "(The) District Court erred in not granting ROBI summary adjudication of issues and in not dismissing REED's counterclaim based upon the doctrine of claim and issue preclusion as enunciated by this Court in Robi v. The

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[10] ROBI's 56f Affidavit specifically requested this REED's referenced settlement agreement with FPI. (APP. Z at 197a, 199a, para 21.) The District Court granted a protective Order (APP. K at 204a, precluding ROBI from access to APP. K (APP. K at 95a).

[11] ROBI's Brief requested the Circuit Court to consider APP. Q (Opening Brief, APP. II) as to the "Denial" to take judicial notice of the Florida D.C. file which included APP. Q (APP. Q at 110a) was an abuse of discretion." (APP. II at 251a.)

Five Platters, Inc. 838 F2d 318 (9th Cir. 1988) (APP. II at 244a). RESPONDENT's assertion that ROBI did not raise the preclusion issues before the Circuit Court is without merit.[12]

ROBI'S PETITION PRESENTS A SUFFICIENT BASIS FOR CERTIORARI

J. PETITIONER contends that the Ninth Circuit Decision (APP. A at 1a) not only "...conflict(s) with a decision by a state court of last resort," (that being the California Supreme Court rulings on partnership law), but in fact the Ninth Circuit decision (APP. A at 1a) by its very holding explicitly precludes from consideration the entire statutory and California Supreme Court decisional authority with regard to partnership and contract law as applicable to trademark issues of music performing groups.[13]

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[12] FRCP Rule 56 requires that all inferences be inferred in favor of ROBI. The District Court and Ninth Circuit adopted certain prior findings in favor of REED and ignored others. (The prior findings twice affirmed that "from 1965 to the present there have been two performing groups as The Platters. One group is controlled by Buck Ram. The other is Robi's.") (APP. F at 58a, January 9, 1989 Findings in CV 84 3326, APP. HH at 230a, Finding N, APP. HH at 233a.) The District Court decision (APP. C at 15a) acknowledges REED's 1967 Affidavit asserting on behalf of FPI in California State Court that ROBI and Zola Taylor should be enjoined ("as set forth in his 1967 affidavit" (APP. CC at 15a, APP. P at 112a)), but the D.C. infers in its Order (APP. CC at 15a), that REED in 1967 was testifying on behalf of the Partnership not the corporation when he testified that ROBI and Zola Taylor should be enjoined in favor of FPI. (APP. C at 16a.)

[13] The underlying District Court decision did not adopt REED's sole basis for Summary Judgment asserting that he was the first to use the name "The Platters" (Motion of REED, APP. W at 181a). The District Court finds (citing only California State partnership law, Peterson v. Lightfoot 191 P. 48, 49 (Cal. N.Y. (sic) Ct. App. 1920) (APP. C at 15a) "...that REED brought a `valueless' name to a partnership which gained value through joint effort..." and that the partnership owned the name. (APP. C at 15a.)

K. The Ninth Circuit opinion (APP. A at 1a) found that "Neither the Ninth Circuit nor the Supreme Court has ever ruled on the issue of ownership of partnership goodwill in a music performing group when one of its members departs and continues to perform under the group name."[14] (APP. A at 6a.) The Circuit also held: "This holding is consistent with the basic purposes ... of the Lanham Act." (APP. A at 9a.) RESPONDENTS (OPP. at 19) cite to Bell v. Streetwise Records 761 F.2d 67, 76 (1st Cir. 1985) (Breyer and Coffin concurring) as supporting the Ninth Circuit decision. Yet, in Bell, supra, the Appellate Court undertakes particular scrutiny to determine whether federal or state law (or both) are applicable, "we apply Massachusetts law." Id. 761 F.2d at 71. "We now examine the rights of the separate employment contracts." Id. 761 F.2d at 73.[15]

L. The Ninth Circuit decision (APP. A at 1a) first implicitly rejects the District Court's finding that "Paul could not assign to Martha" (APP. CC at 20a), holding that "...a manager rather than a performing member can own the performing trademark..." (APP. A at 7a) (Rich v. Buchansky

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The District Court, sua sponte, then adopts the "Last to physically leave the group rule" based upon Bookie Kings v. Guillory 188 So. 2d 445, 449 (L.A. CT APP 1990) and one (1) Federal Court decision that appears to apply state law, Giammaress v. Delfino 197 U.S.P.Q. (BNA) 163 N.D. Ill. 1997) (APP. C at 15a).

[14] As between strangers, the trademark issues may be only federal (in which the State Court has concurrent jurisdiction under the Lanham Act). As to "The Platters" who were partners, the state law of partnership is also applicable, and when these partners resolved litigation through judgments against others or those in privity with them, the doctrine of claim and issue preclusion, is also applicable.

[15] Appellant ROBI's Brief to the Ninth Circuit references California Supreme Court authority and Calif. Corp. Code § 15038(2) (APP. II at 254a) asserting that the appropriate question is not "who physically left," but "who legally left" as determined under California State law.

609 F.Supp. 1522 (S.D. N.Y. 1985)), and the Circuit Court, then finds that the Lanham Act supersedes or, in some manner, incorporates a federal partnership rule of law that "the last to physically leave owns all of the goodwill" specifically applicable to music group partnerships. (APP. A at 8a.)

CONCLUSION

M. The District Court enunciates a state court partnership law of "last to leave" when the partners control the partnership, and grants RESPONDENTS offensive issue preclusion of the ROBI decisions to defeat Martha Robi. The Circuit then grants judicial notice of the Florida District Court decisions (APP. B at 10a, APP. L at 99a), then upholds the District Court's application of offensive issue preclusion in favor of RESPONDENTS, who had dismissed their prior claims against FPI with prejudice before the Florida District Court in 1987 (APP. K at 95a).

N. The Ninth Circuit's then purports to incorporate into the Lanham Act (APP. A at 9a) a federal rule as to partnership of music performing groups, inconsistent with the law of the fifty (50) states, and the Circuit Court then implicitly rejects its own specific doctrine of claim and issue preclusion applicable to this same partnership, Robi v. FPi, supra, 838F.2d 318.

O. The Ninth Circuit then determines that the ownership of goodwill to the name of a musical partnership is solely a question of Federal Law, when in fact State Law must be considered in mixed questions of federal and state law when assignment issues and res judicata issues are intermixed with trademark issues. The matter raised for the granting a position is within the requirements established by Supreme Court Rule 10(a).

Respectfully submitted,

/s/_____
Martha Robi, Pro Se

APPENDIX DD

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed September 15, 1999]

No. 97-16909

D.C. No. CV95-01029-LDG

MARTHA ROBI,
Plaintiff-Appellant,

v.

HERB REED, an individual, dba/Herb Reed and The Platters, an entity unknown; THE FIVE PLATTERS INC.; JOHN VALANO, an individual; J.P. PRODUCTIONS, an entity unknown; TONY CEE ASSOCIATES, an entity unknown; CUZIN RICHARD ENTERTAINMENT ASSOCIATES, an entity unknown; UNITED CONCERT PRODUCTIONS, a New York Corporation,
Defendants-Appellees.

ORDER

Before: CANBY and KLEINFELD, Circuit Judges, and KEEP, District Judge.*

Two distinct issues regarding attorney fee requests remain in this matter. First, we must determine whether an award of fees is proper under Nevada Law and the Lanham Act. Second, we must determine whether an award of attorneys fees and costs should be levied pursuant to 28 U.S.C. § 1927. After substantial briefing on the issues by the parties, we issue the following order.

I. Attorney Fees Pursuant to Nevada Law and the Lanham Act

We first turn to Appellee's[1] Motion for Attorney Fees, filed on April 30, 1999. Appellant filed an Opposition on May 17, 1999. Appellee filed a Reply on June 3, 1999. This request is distinct from the request for attorney fees arising from the costs incurred by Appellee in answering counsel for Appellant's Post-Hearing Letter Brief and the November and March Requests to Take Judicial Notice. Those requests will be addressed in Section II of this order.

Appellee first asks for attorney fees pursuant to Nevada Revised Statute 598A.210(1), Nevada's Unfair Trade

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* The Honorable Judith N. Keep, District Judge, United States District Court for the Southern District of California, sitting by designation.

[1] Throughout this order, the court refers to "Appellee" and "Appellant." Those terms also refer to counsel for Appellant and counsel for Appellee.

Practice Act. We find that fees are not mandated under this statute for at least two reasons.

First, the appeal only involved federal law. The district court opinion is also devoid of any Nevada law. It appears that any injunction that was issued by the district court was based solely on federal trademark law, not on Nevada's Unfair Trade Practices Act. Therefore, it is inappropriate to award fees based on a state statute. See Modzelewski v. Resolution Trust Corp., 14 F.3d 1374, 1379 (9th Cir. 1994) ("since we address federal, not state claims, the federal common law of attorney's fees, and not Arizona law, is the relevant authority.).

Second, the proceedings before the district court indicate that the request for attorney fees, if any are due for work done before the District Court, should have been made to the lower court. In the exhibits accompanying the reply, Appellee submits a copy of a district court order which denies the attorney fee request as premature since judgment was only entered on the issue of liability at the time of the request. The court invited defendants to re-file the motion for fees after final judgment. The district court order denying fees was not appealed. In essence, Appellee is asking this court to rule on an issue that the district court deferred, but recognized was properly before it. Appellee provides no support justifying an award of fees under these circumstances.

Appellee also asks for attorney fees pursuant to the Lanham Act. The Lanham Act provides that a court may award reasonable attorney fees to the prevailing party "in exceptional eases." 15 U.S.C. § 1117(a). Exceptional cases include cases where a party's conduct is "malicious, fraudulent, deliberate, or willful." Intel Corp. v. Terabyte Int'l, Inc., 6 F.3d 614, 621 (9th Cir. 1993) (quoting Lindy

Pen Co., Inc. v. BIC Pen Corp., 982 F.2d 1400, 1409 (9th Cir. 1993)).

This court finds that attorney fees are not justified under the Lanham Act because this case does not present the type of exceptional circumstances that justify attorney fees. The issues in the case were novel; the opinion itself notes that neither the Ninth Circuit nor the Supreme Court had addressed those issues before. In addition, the court finds that the record before us does not indicate that Appellant's conduct justifies awarding attorney fees to Appellee. The specific allegations Appellee makes regarding Appellant's lack of candor are disputed and unclear from the record. We cannot make a finding of exceptional circumstances based on these contested allegations.

For the foregoing reasons, Appellee's Request for attorney fees pursuant to Nevada law and the Lanham Act is DENIED.

II. Attorney Fees for Post-Hearing Letter Brief and Requests for Judicial Notice

On April 26, 1999, counsel for Appellant responded to this court's March 26, 1999 Order to Show Cause why Appellees should not be awarded attorney fees and costs pursuant to 28 U.S.C. § 1927 with regard to the costs and fees incurred in opposing Appellant's Post-Hearing Letter Brief and the November and March Requests to Take Judicial Notice. Appellee filed a reply on May 12, 1999. Pursuant to a request by Appellant, this court issued a second Order to Show Cause on July 15, 1999. In that order, we clarified that this court's Order to Show Cause based on § 1927 applies only to counsel for Appellant. In light of this clarification, we permitted counsel for Appellant twenty-one days to file

supplemental papers. We then allowed counsel for Appellant an additional ten days pursuant to a subsequent request. We are now in receipt of counsel for Appellant's reply papers.

Title 28 U.S.C. § 1927 penalizes the multiplication of proceedings. See Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986). Section 1927 states that any attorney who "so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Courts of appeal may impose such sanctions. See T.W. Electrical Service Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626, 638 (9th Cir. 1987). As we stated in our July 15, 1999 Order to Show Cause, the fees and costs associated with § 1927 are assessed against counsel for Appellant, who filed the motions at issue. We will therefore determine whether this court is justified in awarding Appellee fees and costs incurred in responding to counsel for Appellant's Post-Hearing Letter Brief and the two Requests to Take Judicial Notice, served in November and March.

Section 1927 requires bad faith by the attorney. See Soules v. Kauaians for Nukolii Campaign Committee, 849 F.2d 1176, 1185 (9th Cir. 1988); In re Keegan Management Co., Securities Litigation,78 F.3d 431,436 (9th Cir. 1996). Bad faith includes knowingly or recklessly making a frivolous argument. See Estate of Blas Through Chargualaf v. Winkler, 792 F.2d 858, 860 (9th Cir. 1986).

The history of extraordinary requests and filings, including the three specifically cited above, is instructive on the issue of bad faith. Counsel for Appellant has inundated this court since his Notice of Appeal. In December, 1997, counsel for Appellant moved for an injunction although an

injunction had not been requested first in the district court. Counsel filed approximately 30 pages of errata to correct the opening brief and the reply. Counsel filed a Notice of Intent to Use Visual Aid Charts just prior to oral arguments. Without leave, Appellant's counsel filed a five page, single-spaced "post-hearing letter brief." Counsel for Appellant filed a motion to supplement the record in September of 1998. In November, counsel filed its first Request to Take Judicial Notice. A second request was filed in March. Counsel has also filed a request for rehearing and suggestion for rehearing en banc. More recently, this court has received a motion to strike a reply brief filed by Appellee, three "final" motions to stay the mandate, and a request for more time to file an answer to this motion.

The court is aware that there is sometimes a fine line between vigorously defending a client's interest and acting recklessly. For that very reason, this court confines the scope of the sanctions inquiry to costs and fees associated with the post-hearing letter brief and the two requests for judicial notice.

We find that counsel for Appellee is justified in receiving fees and costs associated with answering the letter brief and the judicial notice requests. The single-spaced letter brief, dated four days after the case was deemed submitted at oral argument, was clearly in violation of Fed.R.App.P. 28(c), which provides that "[u]nless the court permits, no further briefs may be filed." Id. Because it was single-spaced, the brief was akin to a ten-page document which raised arguments that opposing counsel was forced to address, even though Appellant's attorney had not received the permission of the court to file the document.

This court further finds that both the November and the March requests for judicial notice meet the standard for fees and costs pursuant to § 1927. Neither the November nor the March requests for judicial notice contain any supporting case law for the attempt to seek judicial notice of unrelated cases involving some of the same parties. Each request included attachments of numerous matters that were never before the district court nor part of the record on appeal. Additionally, neither request provided analysis as to why the material at issue in the requests for judicial notice was relevant to the matter before this court. Despite the fact that this court rejected counsel's November request, counsel again tried to include materials outside of the record in March. The March request also failed to provide any legal basis for counsel's attempt to expand the record, nor did the request provide analysis as to why the documents at issue were relevant. That request was also denied by this court.

The three motions discussed above were the most egregious in the pattern of filings instituted by counsel for Appellant. Despite their lack of merit, however, counsel for Appellant filed these motions, knowing at the very least that counsel for Appellee could not sit by and allow it to appear he was agreeing to the materials and requests.

Counsel for Appellant argues that the Motions Panel granted a judicial notice request in January, 1998. The granting of one motion, however, does not give counsel leave to file motions that have no basis in fact or law, such as the post-hearing brief and two requests to expand the record. On the record before it, this court finds that counsel's filing of the post-hearing letter brief and the November and March Requests to Take Judicial Notice were made in bad faith insofar as counsel either knowingly or recklessly made numerous frivolous arguments. Despite counsel for

Appellant's pattern of filing questionable motions and requests, this court, mindful that only abuses that clearly meet the § 1927 standard should be punished, restricts fees and costs to those associated with answering those three motions.

III. Conclusion

For the foregoing reasons, we deny Appellee's request for attorney fees pursuant to Nevada law and the Lanham Act, but permit fees and costs associated with responding to the post-hearing letter brief and the November and March Requests to Take Judicial Notice. Counsel for Appellee shall file a statement of its fees and costs for those three motions within 14 days of the filing of this disposition. Counsel for Appellant may file any objection to those fees and costs within 14 days thereafter.

APPENDIX EE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed October 1, 1997]

Case No. CV-S-95-10129-LDG (LRL)

MARTHA ROBI, an individual,
Plaintiff,

v.

HERB REED, an individual, dba HERB REED and THE PLATTERS, an entity unknown; JOHN VALANO, an individual; J.P. PRODUCTIONS, an entity unknown; TONY CEE ASSOCIATES, an entity unknown; CUZIN RICHARD ENTERTAINMENT ASSOCIATES, an entity unknown; UNITED CONCERT PRODUCTIONS, a New York Corporation; THE FIVE PLATTERS) INC., a California corporation,
Defendants.

HERB REED, an individual dba HERB REED and THE PLATTERS, an entity unknown; JOHN VALANO, entity unknown; JOHN VALANO, an individual; J. P. PRODUCTIONS; and entity unknown; *Counterclaimants*	)
v.	)
MARTHA ROBI, an individual, *Counterdefendant.*	)
MARTHA ROBI, an individual, *Counterclaimant*,	)
v.	)
HERB REED, an individual dba HERB REED and THE PLATTERS, an entity unknown, *Counterdefendants..*	)

NOTICE OF APPEAL

Notice is hereby given that Martha Robi, plaintiff/counterdefendant/counterclaimant in the above-captioned case ("Plaintiff"), hereby appeals to the United States Court of Appeals for the Ninth Circuit from:

(i) the Judgment entered on the 29th day of September 1997, dismissing with prejudice Plaintiff's complaint; permanently enjoining Plaintiff from using in any manner the

mark "The Platters"; ordering Plaintiff to deliver to the Court for destruction all goods, articles, or other matters bearing the mark "The Platters"; canceling Plaintiff's Nevada registration of the service mark "The Platters", and all other state registrations by Plaintiff of that service mark; and granting judgment in favor of counterclaimants and awarding damages to counterclaimants in an amount to be determined at a hearing;

(ii) the Order entered on the 29th day of September 1997, granting summary judgment in favor ofdefendants and counterclaimants Herb Reed, John Villano, and John P. Productions, Inc. ("Defendants/Counterclaimants"); denying Plaintiff's Motion For Summary Of Adjudication Of Issues (#119), Motion To Strike Portions Of Herb Reed's Affidavit (#106), Objection To Minute Order (#107), Application For Court To Consider Supplemental Papers (#108), and Request To Take Judicial Notice (#137); and granting defendants/ counterclaimants' Motion To Strike And Dismiss Counterclaims In Reply (#121); and

(iii) all other orders entered in this action.

LIONEL SAWYER & COLLINS

BY /s/_____

Cam Ferenbach, Esq.
David Shenk, Esq.
1700 Bank of America Plaza
300 South Fourth Street
Las Vegas, NV 89101

and

Allen Hyman, Esq.
LAW OFFICES OF ALLEN HYMAN
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Studio City, CA 91604

Attorneys for Plaintiff, Counter-Claimant, and Counter-Defendant, MARTHA ROBI

APPENDIX FF

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed December 9, 1997]

No. 97-16909

D.C. No. CV95-01029-LDG

MARTHA ROBI,
Plaintiff-Appellant,

v.

HERB REED
Defendant-Appellee.

REQUEST TO TAKE JUDICIAL NOTICE BEFORE THE NINTH CIRCUIT COURT OF APPEALS

Appellant Martha Robi ("ROBI") respectfully requests the Ninth Circuit Court of Appeals to take Judicial Notice of the following matters:

No. 1. Complaint in re The Five Platters, Inc. v. ROBI, et al., 84 C3778 U.S. District Court for the Northern District of Illinois, Eastern Division, filed May 1, 1984.

No. 2. Request to Take Judicial Notice by REED in the U.S. District Court, Southern District of Florida in re The Five Platters v. Herb Reed, et al., Case No. 84-8324-CIV-ARONOVITZ filed October 15, 1987.

No. 3. Order Granting Motion to Dismiss and Request to Take Judicial Notice in The Five Platters, Inc. v. ROBI, et al., CV 84-9873 CBM, U.S. District Court, Central District of California dated May 22, 1985.

No. 4. Order Denying Motion for Sanctions and Denying Motion for Summary Judgment in The Five Platters, Inc. v. REED, et al., 84-8324-CIV, ARONOVITZ, U.S. District Court, Southern District of Florida dated April 30, 1986.

No. 5. Order Denying REED's Motion for Summary Judgment in Case 84-8324-CIV in the U.S. District Court, Southern District of Florida dated May 5, 1987.

Respectfully Submitted,

LAW OFFICES OF ALLEN HYMAN

By: /s/_____
Allen Hyman
Attorney for Plaintiff/Appellant
MARTHA ROBI

DATED: December 8, 1997

APPENDIX GG

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed October 22, 1997]

Case No. CV-S-95-10129-LDG (LRL)

MARTHA ROBI, an individual, *Plaintiff*,	)
v.	)
HERB REED, an individual, HERB REED and THE PLATTERS, an entity unknown; JOHN VALANO, an individual; J.P. PRODUCTIONS, an entity unknown; TONY CEE ASSOCIATES, an entity unknown; CUZIN RICHARD ENTERTAINMENT ASSOCIATES, an entity unknown; UNITED CONCERT PRODUCTIONS, a New York Corporation; THE FIVE PLATTERS INC., a California corporation *Defendants*.	)
AND ALL COUNTER-ACTIONS.	)

REQUEST TO TAKE JUDICIAL NOTICE

I.

INTRODUCTION

A. On Saturday, October 18, 1997, Plaintiff Martha Robi's ("ROBI") attorneys received from Archives of the U.S. District Court Records in Atlanta, Georgia, a copy of the Court File in The Five Platters, Inc., v. Herbert Reed, et al., U.S.D.C. (So. Dist. of Florida), Case No. 84-8324 CIV (ARONOVITZ).[1]

B. Based, in part, upon This Florida District Court documentation, ROBI will request the Ninth Circuit to immediately vacate this court's Order and Judgment, based upon the doctrine of claim and issue preclusion, asserting that at a minimum, there are questions of fact as to the "privity" of Herbert Reed with The Five Platters, Inc., ("FPI"), based upon this District Court documentation.

II.

THE 1984 DISTRICT COURT LITIGATION AND THE DISCLOSURE OF THE APRIL 1, 1975, AGREEMENT

A. The District Court file of The Five Platters, Inc. v. Herbert Reed, et al., Case No. 84-8324 CIV (U.S.D.C. Southern District of Florida), includes, in part, the following:

---

[1] Plaintiff ROBI's Exhibit No. 18, in support of FRCP Rule 59(e) Motion, or in the alternative, for a Stay, is the Docket Sheet of this case.

1. The June 26, 1984, FPI Complaint against REED, claiming FPI owns rights to "The Platters" (Page Nos. 1, 6, 20, 23, and 24 of the Complaint is attached as Request to Take Judicial Notice ("RJN"), Exhibit No. 1 (at page No. 6, para. no. 13, FPI alleges it owns the trademark to "The Platters").

2. Count VII of the June, FPI 1984 Complaint, at Para. No. 52 (RJN No. 1 at 20) alleges ". . . Defendant Herb Reed has breached the contract he entered into with the Plaintiff on April 29, 1975. . . ." (Emphasis added).

* * *

[8]

to the question of why this Court should hold the assignment of stock to FPI "was ineffective as to Paul but not as to REED?" (order at 5:10-11). REED consistently aligned himself with and ratified the positions of FPI against the Partnership, and is therefore estopped from benefiting from any favorable consequences of the 1974 decision. REED's representations and ratifications in the April 1, 1975 agreement, confirming assignment of stock after the 1974 decision, provide additional factual basis for treating ROBI differently from REED.

I. This Court in its Order also references the case of The Five Platters Inc. v. Purdie, 419 F.Supp. 372 (1976) (Order at 4:24), which this Court ". . . concluded (that) (the Court in Purdie, supra., had found) the assignment was effective. . ." (Order at 4:24). One of the principle elements of evidence relied upon by the District Court in The Five P!atters Inc. v. Purdie in finding the assignment of stock to be effective to the corporation, was the Purdie District Court's

reference and reliance upon the April 1, 1975, FPI/REED Agreement (The Five Platters Inc. v. Purdie, supra. at 383).

J. The FPI/REED Agreement of April 1, 1975, established privity between FPI and REED, and was totally inconsistent with REED's claims to any partnership property of "the group."

III.

THE DETERMINATION OF THE 1984-1987 FEDERAL COURT CASE

A. On July 25, 19S5, REED answered the FPI Complaint and filed a Counter-claim, which is attached as RJN Exhibit No. 4.

1. REED's Counter-claim asserts breach of the April 1, 1975, contract.

2. REED asserts in his Counter-claim that he is twenty percent (20%) legal owner of The Five Platters, Inc., and has an equitable claim to the eighty percent (80%) ownership of The Platters stock (Counter-claim at 8).

B. REED, in support of Partial Summary Judgment, filed an Affidavit dated May 6, 1985, (attached as RJN Exhibit No. 5), that he ". . . (REED) was one of the original shareholders of The Five Platters, Inc. . . . that (REED) owned 20% of the stock. . . that (REED) has never sold his stock . . . that (REED) served as President and a member of the Board . . . and (REED) demands his stock. . . ."

C. RJN Exhibit No. 6 is a Stipulation of Settlement dated December 10, 1987 (not previously disclosed), signed by the District Court Judge, which Settlement provided for the following:

1. That the actions of REED and FPI be dismissed with prejudice (Para. No. 1).

2. That REED, as long as he complies with the terms of the settlement, ". . . can perform as 'Herbert Reed and The Platters,' or 'Herbert Reed of the Original Platters' . . ." (Para. No. 1).

3. That ". . . REED shall not, other than as set forth, use the name 'The Platters'. . ." (Para. No. 3).

4. That REED sell his stock to The Five Platters, Inc. (Para. No. 4).

5. That REED ". . . shall make himself available for testimony at the request of The Five Platters, Inc . . ." (Para. No. 5).

6. That the parties shall not file, without notice, infringement suits against one another (Para. No. 6).

7. That ". . . should a court of competent jurisdiction enter a final order . . . that The Five Platters, Inc., has no right in 'The Platters,' nothing shall limit REED'S rights in the name 'The Platters,' and this agreement shall not insure to any party other than 'The Five Platters, Inc., and Herbert Reed . . ." (Para. No. 7).

D. RJN Exhibit No. 7 is a Dismissal of all claims with prejudice.

IV.

REED WAS EITHER IN PRIVITY OR BECAME IN PRIVITY WITH THE FIVE PLATTERS INC., AS TO THE 1974 CALIFORNIA JUDGMENT AGAINST FPI, AS TO THE ROBI 1985 AND 1990 JUDGMENTS AGAINST FPI OR THERE ARE QUESTIONS OF FACT IN THAT REGARD.

A. If REED was in "privity" or became in "privity" with FPI at the time or after the 1974 FPI v. Robi State of California Court Decision, REED may be barred from taking a position contrary to ROBI's rights.

B. If REED was in "privity" with FPI at the time of the 1976 FPI v. Purdie, decision, REED may be estopped from taking a position that the trade name "The Platters" is not transferrable, as found in The Five Platters, Inc. v. Purdie, supra.

C. REED had agreed to jointly assist The Five Platters, Inc., in litigation with regard to stopping other groups from using the name, and REED had established a concurrent interest with The Five Platters, Inc., in the name "The Platters."

D. REED may have been in "privity" with The Five Platters, Inc., in 1989 when ROBI prevailed against The Five Platters, Inc. REED, through both the April 1, 1975, Agreement and the December 10, 1987, FPI/REED Agreement, established a concurrent

* * *

APPENDIX HH

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed January 9, 1989]

No. CV 84-3326 (CBM)

PAUL ROBI, *Plaintiff*,	)
v.	)
THE FIVE PLATTERS, INC., JEAN BENNETT, and BUCK RAM, *Defendant*.	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case came on regularly for trial before the Honorable Consuelo B. Marshall, United States District Judge, sitting without a jury. Allen Hyman, of the law office of Nagler & Schneider, Los Angeles, California, appeared on behalf of plaintiff; and Cheri S. O'Laverty, Los Angeles, California, appeared as counsel for defendants. The case having been submitted for decision, the Court now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This case is the second to be adjudicated by the Court between these two parties. In a companion case, The Five Platters, Inc. v. Paul Robi, et al. , CV 84-9873 (CBM), this Court filed an order granting summary judgment on May 22, 1985, which was affirmed by the Ninth Circuit in its opinion filed on January 27, 1988.

2. On June 21, 1988, this Court issued an order in this case granting Robi's motion for summary adjudication of issues not in controversy and issued its findings. Those findings are incorporated herein:

a. Thirty years ago, in September 1954, Paul Robi joined Herbert Reed, Tony Williams, Zola Taylor and David Lynch in a singing group which had been formed in 1953. The group was called "The Platters."

b. When Robi joined the group, he assisted the other Platters with musical arrangements and organized and led the group's rehearsals.

c. In early 1955, "The Five Platters" emerged as a performing group. Success came quickly. During the period from 1955 to 1960, The Platters recorded many hit records; thirteen of their recordings made during this period sold more than a million records. Among their hits were "The Great Pretender" and "Twilight Time."

d. All told, The Platters sold over forty million records during this time period. They performed throughout the United States and all over the world. They made appearances in movies and on television shows, including the "Ed Sullivan Show."

e. From 1955 through 1964, The Platters had a recording contract with Mercury Records. All of The Platters' hit records were recorded during this nine-year period. The only persons to perform as The Platters during this period were Robi, Taylor, Reed, Williafns and Lynch.

f. The Five Platters, Inc. has presented a list of major hit records and performance credits of The Platters. This list evidences the goodwill created by Robi, Taylor, Reed, Williams and Lynch in the name "The Platters."

g. From 1955 on, The Platters was managed by Buck Ram. Ram managed the group, promoted the group, and composed many of its songs. He also acted as The Platters' financial advisor. Ram represented to Robi and to the other members of the group that he would look after their welfare. Robi and the other Platters were young and inexperienced in business. Ram obtained control of the financial, legal and business affairs of The Platters.

h. In 1956, based on Buck Ram's advice, The Platters undertook to form a corporation known as "The Five Platters, Inc."

i. Robi, Taylor, Reed, Williams and Lynch were the original stockholders of the corporation.

j. As recommended by Ram, Robi and the other Platters assigned their rights to the trade name "The Platters" to the corporation in exchange for stock in the corporation.

k. Between 1960 and 1965, Ram illegally obtained all the shares of stock in the corporation; The Platters worked as the corporation's employees.

l. Robi left The Platters in 1965 after several disagreements with Ram, after Robi had come to believe that Ram had unfairly taken advantage of Robi and the other Platters, and, apparently, after some personal problems as well.

m. Robi then formed his own, group called "The Platters."

n. From 1965 to the present, there have been two performing groups known as "The Platters." One group is controlled by Buck Ram and his corporation, The Five Platters, Inc. The other group is Robi's.

o. During the period 1967 to 1976, Robi was a defendant in a series of legal actions brought by The Five Platters, Inc. in Los Angeles County Superior Court. This prior litigation spanned a nine-year period.

p. On three occasions, The Five Platters, Inc. attempted unsuccessfully to obtain preliminary injunctions against Robi.

q. This prior litigation resulted in a judgment at trial against The Five Platters, Inc. and in Robi's favor.

r. There has been extensive litigation in California Superior Court concerning the identical claims and issues now brought before this Court by The Five Platters,

Inc. against Robi and against, the owners of venues at which Robi was to, or did, perform.

s. The prior litigation filed by The Five Platters, Inc. involving Robi consisted of the following:

(1) A complaint was filed by The Five Platters, Inc. against Robi, et al. on September 28, 1967 in Los Angeles Superior Court (Case No. 918695) requesting a temporary restraining order, preliminary and permanent injunction against Robi and others, prohibiting Robi from appearing, performing or recording under the name "The Platters."

(2) The Five Platters, Inc.'s application for a temporary restraining order was denied on September 28, 1987.

(3) On November1 , 1967, The Five Platters, Inc.'s motion for preliminary injunction was denied.

(4) This action was dismissed on October 10, 1972 for failure to prosecute.

(5) One month after the first action was dismissed for failure to prosecute, The Five Platters, Inc. filed another complaint against Robi, et al. One of the nightclubs in which Robi was performing was also named as a defendant; early in the litigation, this defendant entered into a stipulated judgment, agreeing to an injunction.

(6) The second action was tried, commencing on September 4, 1974.

(7) A trade name/trademark was issued for the use of the name "The Platters" to The Five Platters, Inc. for one year.

(8) Proof of registration was entered into evidence at the trial. The Five Platters, Inc. also filed a trial brief which argued its trade name/trademark rights to use the name "The Platters."

(9) The trial brief argued that The Five Platters, Inc. was the owner, of the U.S. trademark registration "The Platters"; that The Five Platters, Inc. claimed infringement of its trademark, and that the resolution of the trial turned on questions of trademark law; and that The Five Platters, Inc.'s marks and Robi's marks were similar, and that the parties were in direct competition.

(10) The findings of fact and conclusions of law and a judgment in Robi's favor were filed on November 14, 1974. This Court has adopted the following findings of the Superior Court (Case No. C43926) as binding on the parties in this case.

(a) During the year 1954, a singing group of five individuals began appearing professionally under the name of "The Platters" and Paul Robi was a member of the group.

(b) During the period 1954-1959, when the group became enormously popular, the composition of the group remained the same and included Paul Robi. The name "The Platters" was owned by the five individuals comprising the group as a partnership, and the five individuals, including Robi, are the individuals in the public's mind who comprise the group "The Platters" and were responsible for its success.

(c) The Five Platters, Inc. was formed by a lawyer selected by Buck Ram and shortly thereafter, Robi and the other members of the group executed employment contracts with the corporation where the right to the name "The Platters" purportedly was transferred to the corporation in return for the corporation's stock.

(d) The corporation's stock which was thereafter issued to the members of thegroup was issued illegally and the issuance was void in thatit did not comply with the terms of the permit issued by the Division of Corporations of the State of California.

(e) Robi's purported transfer of his rights in the name "The Platters" to the corporation was never effectuated, since the stock transfer was illegal and in violation of California's securities laws.

(f) Members of The Platters received nothing from the corporation for their interest in the name "The Platters," or other assets of the predecessor partnership, and the corporation was dominated by Buck Ram and was a sham used by Ram to obtain ownership of the name.

(g) An unequal bargaining position existed between Ram and the members of The Platters, including Robi.

(h) The group sponsored by The Five Platters, Inc. includes noneof the people who made the name "The Platters" famous.

(i) The Five Platters, Inc. has been acting with the intention of misleading the public

into believing that the group it is presenting as "The Platters" is the original Platters, and a substantial portion of the public has been misled by the corporation's acts.

(j) The Five Platters, Inc. has been guilty of laches, does not come into equity with clean hands and is not entitled to injunctive relief.

(k) Until January 1956, the name "The Platters" was owned by the five individuals comprising the group as a partnership. Buck Ram represented to the group that it was necessary for the best interest of the group and to protect the group to form a corporation, and that the formation of a corporation would prevent others from utilizing the group name and trading on the group's reputation

(l) At the time the corporation was formed, Buck Ram was a law school graduate, while the members of the group were young and inexperienced in business. An unequal bargaining position existed between the parties. In the years 1962 through 1966, all of the original five members of the group sold their interest in the corporation to Buck Ram as an individual.

(m) The corporation has continued to present and is presenting to the public a group called "The Platters." This group includes none of the five people who made that name famous. Plaintiff has been and is doing this with the intention of misleading the public into believing that the group it is presenting as "The Platters" is the original "The Platters." This group used the same arrangements and fifty percent or more of the the same repertoire and the same singing style as that popularized by the members of the original group.

(n) The Five Platters, Inc. and Buck Ram have misled a substantial portion of the public into believing that the group now presented as "The Platters" is the same as the original group, and a substantial potion of the public is misled by the way the present group is presented.

(o) The representation by Buck Ram that the formation of the plaintiff's corporation was for the best interests and protection of the members of the group was false. The Five Platters, Inc. corporation has been used to obtain the right of the original members of the group to the name "The Platters."

(11) Since the time that the above final and binding determination was entered in 1974, The Five Platters, Inc. instituted litigation against Robi, based on the same claims that were decided by the 1974 judgment.

(12) One such action resulted in an Australian court granting a temporary restraining order against Robi.

(13) There is no evidence that a court hearing was held in Australia or that the Australian court was made aware of the prior California judgment in Robi's favor.

(14) The Five Platters, Inc. sent letters to venues at which Robi was scheduled to or did appear threatening litigation should Robi be permitted to perform using the name "The Platters" in connection with his "act."

(15) These threats have interfered with Robi's ability to pursue his business.

3. The 1974 decision rendered by Judge Levit was adverse to defendants' claim of ownership of their trademark in that the court determined that defendants were not the only parties entitled to use the registered name and, accordingly, denied injunctions prohibiting such use by others, including the plaintiff herein.

4. The defendants in this case are a California corporation, The Five Platters, Inc., Buck Ram, a director of that corporation who owns 60% of its stock, and Jean Bennett, the president of the corporation who is an owner of 80% of the stock of Personality Productions, Inc., which is the owner of 20% of the stock of defendant The Five Platters, Inc.

5. During the period 1968, up to and including the trial in this case, defendants have engaged in acts which prohibited and inhibited plaintiff Paul Robi from performing under the trade name "The Platters."

* * *

[23]

24. Defendants are guilty of such conduct. Therefore, punitive damages are awarded in the amount of $2,000,000.

25. Any Finding of Fact deemed to be a Conclusion of Law shall be treated as a Conclusion of Law.

DATED: JANUARY 9, 1989

/s/_____
CONSUELO B. MARSHALL, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX II

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed March 4, 1998]

No. 97-16909

D.C. No. CV95-01029-LDG

MARTHA ROBI,
Plaintiff-Appellant,

v.

HERB REED, et al.
Defendant-Appellee.

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA THE HONORABLE LLOYD D. GEORGE, PRESIDING

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ARGUMENT 20

The District Court erred when it granted summary judgment for *Counter-Claimants/Appellees,* Herb Reed, John Villano, and John P. Productions, Inc., (collectively "REED") finding that REED had superior rights over MARTHA ROBI to the musical performing group trademark "The Platters."

A. The District Court erred in not finding that, at a minimum, that there were existing questions of fact (if not conclusively determined in MARTHA ROBI's favor) of whether REED was in privity with or had a mutuality of interest with The Five Platters, Inc., and its President, Jean Bennett, that barred REED's counter-claims based upon this Court's decision in Martha Robi vs. The Five Platters, Inc., Jean Bennett and Buck Ram 918 F.2d 1439 (9th Cir. 1990), upholding the judgment and finding of the California District Court in

B. The District Court's decision is also erroneous in the District Court's determination of ownership rights to the "goodwill" of the musical partnership "The Platters." The District Court reasoned that under Partnership Law (pertaining to partners in a musical performing group) that the last partner remaining in a group (apparently REED), when all other partners have "left the group," owns all of the goodwill to the trademark. There are questions of fact and errors of law in that: (1) None of the "Original Platters", Tony Williams, David Lynch, Zola Taylor and Paul Robi, left a partnership that they owned and controlled as partners. (2) There are questions of fact if these partners "left" an organization, The Five Platters, Inc., controlled by RAM and REED, which had misappropriated all of the original partners partnership property and goodwill. (3) California Partnership Law, which would govern the determination of rights in a dissolution of a 1954 Platters musical partnership, which law the District Court did not consider, would result in a conclusion contrary to that of the District Court, and would find REED's conduct from 1960 to 1996 was adverse to the interests of the original Platters partnership. REED would not be entitled to any of the goodwill or trademark right of "The Platters" partnership whatsoever.

C. The District Court also erroneously concluded that, as a matter of law, that "Original Platter," Paul Robi (Appellant Martha Robi's deceased husband) could not, prior to the time of his death in February, 1989, have transferred to his wife and heir, Martha Robi, Paul Robi's rights and interest in the goodwill to the musical trademark, "The Platters." The District Court erred in finding, as a matter of law, that Martha Robi cannot, as a "non-performing" owner, hold rights in a musical performing group trademark.

The District Court erred procedurally, in that prior to granting Summary Judgment in favor of REED, The District Court granted REED's request for a Protective Order, and denied Martha Robi's request to complete outstanding discovery under FRCP 56(f), precluding Martha Robi from inquiring into REED's past and/or present relationship with The Five Platters, Inc., and Bennett.

The District Court then further erred under Federal Rule of Evidence 201(a) and 201(d) by not granting Martha Robi's Request to Take Judicial Notice of the files of both the December, 1996, Nevada Bankruptcy Court filing of The Five Platters, Inc., and the files of the District Court of the Southern District of Florida in the 1984 case of The Five Platters, Inc. v. Reed, Case No. 84-8324 (in which the Ninth Circuit Motions Panel did grant judicial notice over REED's objections), both of which demonstrated that there is, at a minimum, a question of fact whether or not since April 1, 1975, REED has been in privity with and had a mutuality of interest with The Five Platters, Inc., and Bennett, with regard to the trademark "The Platters."

The District Court erred in not granting Martha Robi summary adjudication of issues and in not dismissing REED's counterclaim as barred by the doctrine of claim and issue preclusion as enunciated by this Court in Paul Robi v The Five Platters, Inc., 838 F2d 318 (9th Circ., 1988) and by dismissing ROBI's counter-claims in Reply against REED

Martha Robi does request attorney's fees

THE DISTRICT COURT COMMITTED ERROR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF REED 21

* * *

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(CR 142, ER 123). Martha Robi's Appeal is timely as provided by FRAP 4(a) (1). ROBI's right to appeal is provided by 28 U.S.C. 1292(a) (1). The Judgment entered by the District Court (CR 141, ER 122) is not a final judgment within the meaning of 28 U.S.C. 1291, in that the District Court has reserved for adjudication the issue of damages (Judgment at 10:7-9) (CR 141 ER 122)[1] though the judgment grant of a "Permanent Injunction", against Martha Robi (Judgment at 9:20-23; CR 141, ER 122). The Judgment is interlocutory and appealable under 1292(a) (1).

The District Court's entry of a "Permanent Injunction", presents to this Appellate Court the identical procedural

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[1] On December 6, 1997, Martha Robi moved this Court, among other matters, to exercise pendant appellant jurisdiction, which the Motions panel did not address.

disposition described in Marathon Oil v. U.S., 807 F.2d 759, 764 (9th Cir. 1986).[2]

Under the doctrine of pendant appellate jurisdiction, ROBI seeks review of the underlying Summary Judgment Orders at this time, asserting that the District Court's granting of Summary Judgment is "inextricably bound up" in the District Court's orders granting and denying preliminary injunctive relief. All claims and counterclaims have been

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[2] In Marathon, supra., this Court held:

". . .The entry of summary judgment and partial dismissal, however, was not a final judgment within the meaning of 28 U.S.C. Sec. 1291 because the district court retained jurisdiction to conduct an accounting. . . . Therefore, the injunction, although permanent in nature, is an interlocutory order appealable under section1292(a) (1).(Citations)

* * *

. . . [W]e see no need to refrain from determining the validity of the legality and enforceability if the order is inextricably bound up with the injunction that requires Marathon to comply with the orders. The district court has completed its consideration of the liability issue, retaining jurisdiction only for an accounting of damages. We conclude therefore, that we have jurisdiction pursuant to section 1292(a) (1) to review the summary judgment and partial dismissal and that we should do so in this case. . ." Marathon, supra, at 807). (Emphasis added.)

adjudicated (CR 141, ER 122). The record is complete as to all substantial issues.[3]

STATEMENT OF THE CASE

On October 26, 1995, Appellant Martha Robi filed her Complaint asserting unfair competition, and other tort claims against REED, REED's manager and agent John Valano, and J.P. Productions, and others not directly associated with REED (CR 1, ER 1). On December 15, 1995, REED moved Court to Dismiss or change venue (CR 7, ER 2).[4]

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[3] ". . .Although the Supreme Court has indicated that the doctrine of pendant appellate jurisdiction should be limited, Swift vs. Chamber County Commerce, 514 U.S. 35, 115 S. Ct. 1203, 1208-1212 (1995), the Supreme Court also found that pendant appellant jurisdiction is appropriate when the "non-reviewable orders were" inextricably intertwined with the reviewable order. . ." Swift v. Chamber County, supra., 115 S.Ct. at 1208-1212.

[4] Also on December 20, 1995, REED filed a parallel action as plaintiff, asserting claims pertaining to the same ownership of trademark issues in the United States District Court for the Southern District of New York, not informing the New York District Court of the Nevada Action (Exhibit F to the December 18, 1995, Affidavit of REED in Support of Motion to Dismiss (CR 8B, ER 3)).

On April 24, 1996, pending the District Court's consideration of REED's Motion to Dismiss, Martha Robi applied for a Temporary Restraining Order and an Order to Show Cause why a Preliminary Injunction should not issue, precluding REED from interfering with Martha Robi's activities of promoting and

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Motion for Summary Adjudication of issues, denied Martha Robi's Request to take Judicial Notice of the Nevada Court's Bankruptcy filing of The Five Patters, Inc., and issued a permanent Injunction enjoining Martha Robi from any further use of the tradename The Platters (CR 141, ER 122).

On October 1, 1997, Martha Robi filed her Notice of Appeal (CR 142, ER 123). On October 6, 1997, Martha Robi filed an Ex Parte Application for a temporary stay of injunction (CR 144). On October 8, 1997, the District Court, in part, granted a stay and set a scheduling order for briefing of the parties (CR 155, ER 125) .

On October 22, 1997, Martha Robi filed her Request to Take Judicial Notice of the U.S. District Court for the Southern District of Florida files of The Five Platters, Inc. v. Reed, Case No. 84-8324 (CR 162, ER 126), which included an eight (8) page April 1, 1975, Agreement between REED and The Five Platters, Inc. (CR 162-2, ER 128), and a December 10, 1987 Agreement between The Five Platters, Inc and REED (CR 162-6, ER 129).

On October 28, 1997, The District Court denied Martha Robi's Request for a Stay of the prohibitory elements of the injunction, pertaining to her use of the trademark "The

Platters, and granted a stay to the mandatory aspects of the injunction (Court Minutes of October 28, 1997 hearing (CR 168, ER 130); Transcript of Proceedings (CR 168-1, ER 132)).

On December 5, 1997, Martha Robi filed a Motion with the Ninth Circuit Motions Panel, for an order, expediting the Appeal, staying the Injunction, pending appeal, for an Order to have Martha Robi's Motion papers be deemed the Opening Brief in the Case, requesting the Appellate Court to Take Judicial Notice of certain filings in the Five Platters, Inc. vs. Reed Florida District Court 1984 Case No. 84-8324, and requested injunctive relief enjoining REED from proceeding with his litigation against Martha Robi. The

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for the Central District of California. Martha Robi vs. Five Platters, Inc., supra, 918 F.2d 1439 (CR 51-6, ER 54).

24. ROBI brought a Motion for Summary Judgment against FPI, based upon the 1974 California Judge Levitt's decision, which motion was upheld based upon the doctrine of claim and issue preclusion, which decision of the District Court granting Summary Judgment was upheld in Paul Robi's favor against FPI in 1988. Robi vs. Five Platters, Inc., supra, 838 F.2d 318, 323-324 (CR 56-75, ER 53).

25. Unknown to ROBI, in 1984 FPI had sued REED for violating the April 1, 1975 agreement in the Florida District Case 84-9873. (CR 162-1, ER 127) Request to Take Judicial Notice (CR 162, ER 126). Upon ROBI's grant of Summary Judgment in ROBI's favor by the District Court in California, REED attempted on several occasions to

utilize the ROBI decisions in California as collateral estoppel against FPI, without success. (9th Cir.-2-5, ER 140) Florida District Court acknowledging California Orders denied REED summary judgment.

26. In the Florida District Action in 1987, REED introduced before the Florida District Court all the favorable Robi vs. Five Platters, Inc, decisions obtained before the California Superior Court in 1974 and Judge Marshall's Summary Judgment of 1985. (9th Cir.-2-5, ER 140) The Florida District Court would not grant REED collateral estoppel based upon the Robi Judgments, but indicated the Florida District Court would reconsider, if this Ninth Circuit upheld Judge Marshall's decision on appeal. (9th Cir.-2-5, ER 140) Prior to this Ninth Circuit upholding Paul Robi's decision on summary Judgment (the January 27, 1988 decision Robi vs. Five Platters, Inc., 838 F.2d 318), REED entered into a second agreement with FPI on December 10, 1987, again ratifying FPI's rights, affirming his status as FPI's licensee, agreeing to assist FPI in litigation and enforcement of the FPI rights, and it provided as so long as FPI had rights, REED would be bound by this agreement in favor of FPI. (9th Cir.-2-5, ER 140) REED/FPI December 10, 1987 Agreement (CR 168-6, ER 129)

27. In 1989, ROBI's claims against FPI, Bennett and RAM went to trial and resulted in a judgment against FPI, Ram and Bennett three million five hundred thousand dollars ($3,500,010.00), a cancellation of the FPI three (3) trademark registrations, and the entry of a permanent injunction in favor of ROBI against FPI, Bennett and RAM and those actions on their behalf from taking any action, any litigation, or communicating to anyone, that Paul Robi did not have rights to the name The Platters. Martha Robi vs. Five Platters, Inc., 918 F.2d 1439 (CR 56-76, ER 54)

28. In February 1989, Paul Robi died, Martha Robi was substituted as the party Plaintiff in the case, Bennett, FPI and Ram filed bankruptcy and took the case on appeal to the Ninth Circuit. Martha Robi vs. Five Platters, Inc., 918 F.2d 1439 (CR 56-76, ER 56)

29. On May 30, 1990, an amended judgment was entered by the California District Court in favor of Martha Robi, which judgment awarded Martha Robi damages, and a permanent injunction against FPI, Jean Bennett, Ram, and those associated with them, from initiating litigation, or in any manner interfering with Martha Robi's (not Paul Robi's) rights or communicating to anyone that ROBI did not have rights in the name The Platters. (ER 56-73, ER 51) (Injunction at page 2 of Judgment)

30. Martha Robi then undertook considerable effort and expense to establish rights in District Courts and before the public from 1989 to 1996. (CR 56-77, ER 95; CR 56-78, ER 56; CR 56-79, ER 57; CR 56-80, ER 58) REED took no action to claim rights until in 1996 when ROBI applied for a U.S. registration. REED then filed an opposition. REED then in 1996 commences sending letters

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the request to take judicial notice is mandatory under Federal Rule of Evidence 201(d), as Martha Robi requested in this case, Appellant has not found authority setting forth the standard of review.

SUMMARY OF ARGUMENT

The District Court's basis for granting Summary Judgment finding that all rights to "The Platters" trademark belonged to REED was that REED, as the last member of The Platters who left the group, owned the rights to the trademark. This finding on Summary Judgment is erroneous in its application of the facts and consideration of the Law of Partnership.

The District Court's finding on summary judgment that Paul Robi cannot transfer to Martha Robi rights in a musical performance group trademark is erroneous as a matter of law, and is not based either upon any factual basis in the record as to the public's recognition of The Platters as being associated with particular performers, and is supported as a matter of law.

The District Court's granting of REED's motion for a protective order and denial of Martha Robi's timely Motion under Rule 56(f) for continuance of the Summary Judgment Motion to take discovery of matters pertaining to REED's relationship with The Five Platters, Inc., information clearly within REED's knowledge and not readily available to Martha Robi was an abuse of discretion.

The District Court's denial of Martha Robi's request to take judicial notice, under Federal Rule of Evidence 201(d), of court orders and documents filed in the Nevada Bankruptcy Court and the District Court for the District of Florida, in Case CV 84-9873 including 1997 court orders directly pertaining to REED's position taken before the Florida District Court (9th Cir.-2-5, ER 141) was clearly an abuse of discretion.

The District Court committed error in dismissing Martha Robi's counterclaim in Reply and committed error in not granting Martha Robi's Motion for Summary Adjudication of Issues against REED, when considering the evidence presented in the Martha Robi's Request to Take Judicial Notice.

ARGUMENT
THE DISTRICT COURT COMMITTED ERROR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF REED

The District Court granted summary judgment on its own theory not advanced by either party. As the District Court held in its Order, REED's premise was that REED owned all the rights to The Platters in 1997 because ". . . in 1953, he formed a musical group and named it The Platters . . ." (Order at 3:6-8) (CR 140, ER 121) The Nevada District Court Order does not accept REED's basic premise, and held that ". . . Although rights to a mark arises from prior use, the Court also notes that when a partner brings a valueless name to a partnership, which then gains value through the joint effort of all the partners, the name is deemed property of the partnership. . ." (Order 3:10-15) (CR 140, ER 121)

While the Nevada District Court's premise that the name "The Platters" was partnership property as of 1954 appears unquestionably correct, and is consistent with all prior state and federal court decisions that have addressed this matter, the District Court Opinion becomes anomalous in reaching its conclusion that, forty-three (43) years later, as of 1997, all partnership property in the 1954 Platters Partnership of Williams, Taylor, Lynch, Robi and Reed belong to REED because REED was the last to leave the group. "Since Reed was the original member who remained with The Platters as

the others left, it is Reed who now owns the exclusive right to the mark The Platters." (Order at 7:2-3.) (CR 140, ER 121)

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In Smith v. Bull, 50 C.2d 294; 325 P.2d 463 (1958), the California Supreme Court found that the Estate of a deceased partner was entitled to an accounting for goodwill from the partners that carried on the business; "continuing partner liable to deceased partner's widow for $26,695.83, in value of goodwill of the ongoing service business, after partnership dissolved, as part of the winding up of the affairs of the partnership" (Smith, supra. at 302). ". . . Appellant continued to operate the business and to capitalize on the goodwill of the business as a going concern. This was an asset of the partnership which he was using for his own benefit. . ." (Miller v. Hall, 656 CA.2d 200 (1944)); continuing partner required to account to partner that left the partnership for the goodwill, appropriated by the partner that continued the business (Miller, supra, at 206)). Contrary to the District Court's Order in this case (CR 140, ER 121), even if partners do leave a partnership, the remainin9 partners must account to the departing partners or their heirs (Martha Robi, for one).

As to the rights to the goodwill of departing partners, California Corporations Code Section 15038(3) also provides for ". . . The rights of partners to partnership property. . ." under dissolution caused by wrongful acts of a partner when dissolution is caused in contravention of the partnership agreement, the rights of the partners shall be as follows:

> ". . . (b) The partners who have not caused the dissolution wrongfully, if they all desire to

> continue the business in the same name, either by themselves or jointly with others, may do so. . ."

The Nevada District Court in its Decision found ". . . that Williams, Taylor, and Paul formed a new group in 1967, and identified themselves as The Platters, did not divest the original group of its exclusive right to the name, since none of the individuals had taken with them the right to use the name. . ." (CR140, ER 121) (Order at 6:15-18) The District Court's conclusion is simply inconsistent with California Corporations Code Section 15038(2) in that there are questions of facts that, if REED undertook acts inconsistent with the partnership by supporting the claims of FPI as against the partners. The REED 1967 testimony, stating that FPI owned all rights to the trademark (CR 56-49, ER 33), the July 12, 1968 letter of REED asserting exclusive rights owned by The Five Platters, Inc.) (CR 56-48, ER 32.) According to California Corporations Code 15038(2) The Robi Platters, formed when Robi left in 1965, were entitled to carry on the business of the Platters partnership. California Corporations Code further states:

> ". . . (c) (with regard to a partner who has caused dissolution wrongfully) A partner who has caused the dissolution wrongfully shall have. . . If the business is conducted under paragraph (2) (b) (the) right to have the value of his interest less any damages caused to his copartners. . . but in ascertainment the value of the partner's interest the value of the goodwill of the business shall not be considered. . ." (If REED caused the dissolution by wrongful acts, REED is the one not entitled to an accounting for goodwill, not

the partners who left The Five Platters, Inc. controlled group).

Also, if the District Court is correct that REED was the remaining partner, REED had a fiduciary duty to those that left. In Rosenfeld, Myer & Sussman v. Cohen, 146 Cal.App.3d 200, 194 Cal.Rptr. 180 (Aug. 1983), the Court stated that with regard to a partnership that had been dissolved ". . . a partner of a dissolved

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"The Platters," in that the "partnership property" had been misappropriated by The Five Platters, Inc., (CR 56-74, ER 52) (Findings, Para. (10) (a) to (o), p. 6 to p. 9, January 5, 1989, CV 84-3326 CBM), (with REED's assistance) (then under California Corporations Code Section 15038(2) (b)), the partnership goodwill came to reside in the "ROBI Platters" group (the non-breaching partners), not the continuing "Five Platters, Inc., Platters" group, which included breaching partner REED. REED, who continued to support and ratify the acts of The Five Platters, Inc. (CR 1622, ER 128) appears to have forfeited his rights to partnership goodwill under California Corporations Code Section 15038(c) (2) (II).[10]

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[10] ROBI's Counter-claims in Reply (CR 103, ER 97) p. 22: paras. 20 to 25) asserted breach of partnership duties by REED, which claims were dismissed by the Nevada District Court (Order, 3:24-26; CR 140, ER 121).

REED WAS IN PRIVITY WITH THE FIVE PLATTERS, INC. AS OF APRIL 1, 1975

Also the District Court two authorities involving the Boogie Kings, supra, or the Buckinghams were cases undertaken apparently immediately upon the partnership dissolution. The Nevada District Court's decision purports to resolve the partnership dissolution of the 1954 Platters partnership in 1997, forty (40) years after its dissolution after numerous State and Federal Courts decisions, pertaining to the rights to The Platters. Partnership analysis does not resolve the effect of forty-three (43) years of differing decisions applicable to the different members of the "Original Platters." As this Circuit Court found in Robi v. Five Platters, Inc., 838 F.2d 318, (1988) (Ex. No. 8, 321), original member Paul Robi won, original member WILLIAMS lost, and original member Zola Taylor stipulated to an adverse injunction (Robi, supra., 838 P.2d 318 at 321, fn. 1). REED as well during

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(b) As to the issuance and ownership of stock by The Five Platters, Inc., on April 1, 1975, at Paragraph "B," REED and FPI agree:

> ". . . FPI was formed in 1956. At the time of its formation it was contemplated that FPI would be jointly owned by the members of the original Platters, and its stock was attempted to be issued to such members. In or about 1964, it was discovered that such stock issue was defective, in that the permit for the issuance of such stock had not been complied

with. Nevertheless, all of the parties receiving such stock, and in particular the parties hereto, have at all times treated it as validly issued and validly transferable, and such stock has at times been transferred among various of the original members of the Platters and some of the parties hereto.[11]

(c) REED agrees that, as of April, 1975: ". . . that FPI was and is a validly formed and existing corporation, which is owned by the parties hereto. . ." (Emphasis added) (CR 162-2, ER 128)

(d) The April 1, 1975, Agreement provided that FPI shall ". . . render to REED a full and complete accounting of all of its activities for each fiscal year ending 1969 through 1974. . ." for that period of use (Para. "B").

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[11] REED, in 1996, changes his position and now, in his Affidavit, attempts to adopt, twenty-three (23) years later, the 1974 Robi v. Five Platters, Inc., finding: ". . . My supposed assignment of rights to the corporation and supposed relinquishment of ownership of such rights were fraudulently obtained, not understood, and ineffective. . ." (REED Aff. in Opposition to Motion for Preliminary Injunction and in Support of Motion for Summary Judgment (CR 56-100, ER 77), para. 43, last sentence. The fundamental problem with this position by REED in 1997 is that the District Court Judge in Florida District Court Five Platters v. Reed 84-C3778 rejected REED's attempted switch in sides, not finding that finding binding on REED's behalf against The Five Platters, Inc., Ninth Circuit granting of Robi's Request to Take Judicial Notice (9th cir-2-5, ER 141)

(e) REED also agreed at Paragraph 4(a) (Vol. 8, 2176), that ". . . neither Reed nor any of his agents, employees . . . shall utilize the name 'The Platters' and that . . . REED may present himself and his group as 'Herb Reed, formerly of The Platters'. . ." (CR 1622, ER 128)

(f) And on April 1, 1975, REED promised FPI that he ". . . shall assist FPI in all of its litigation and other proceedings undertaken against persons utilizing the name 'The Platters'." (CR 162-2, ER 128)

(g) At Paragraph No. 6 of the April 1, 1975, Agreement, REED agreed that ". . . Ram, Bennett, FPI and PP shall use their best efforts to assist Reed in obtaining advantageous employment for music groups with which he performs. . ."

(h) The April 1, 1975, Agreement provides at Para. No. 7 that the Reed v. Buck Ram lawsuit, Case No. C-960429, and The Five Platters, Inc., lawsuit in Florida, Case No. 69-13784, were both dismissed with prejudice.

The Nevada District Court in its September 26, 1997, Order in this case (CR 140, ER 121 at 5:1-9) references the California Superior Court's November 14, 1974 findings as to the exchange of stock for rights in the name "The Platters," and questions why this finding is supportive of ROBI but not REED:

> ". . . this Court will likewise adopt the following findings of the California Court, which are binding upon Robi:
> Robi has failed to offer any argument, nor could she, suggesting that the group's assignment of the name owned by the group

was ineffective as to Paul but not as to REED. . ." (CR 140, ER 121, at 5:10-11).

The answer to the Nevada District Court's question is found in the April 1, 1975, REED/FPI Agreement (CR 162-2, ER 128) and more particularly in the Florida District Court Order of May 5, 1987 (9th Cir.-2-5, ER 141) in which the Florida District Court in Five Platters, Inc. v. Reed rejected REED's claim of collateral estoppel, and invites REED to resubmit his Motion if the Ninth Circuit upholds the Robi/FPI District Court decision. REED does not wait for this Appellate Court to rule and enters into a second agreement with The Five Platters, Inc., on December 10, 1987 CR 162-6, ER 129), one month before this Court renders its decision in Robi vs. Five Platters, Inc., supra, 838 F.2d 318.

ROBI suggests that the April 1, 1975, Agreement of five (5) months after the entry of the Findings by the California Superior Court, adverse to FPI, establishes that REED was in privity and had a mutuality of interest with FPI as of April, 1975, and that REED ratified the acts of FPI, and that again in the December 10, 1987 FPI/Ram Agreement (CR 162-6, ER 129) REED ratified the acts of FPI, which though REED has an opportunity by the District Court in Florida to await the decision of whether this Circuit Court will affirm Judge Marshall's decision favoring Paul Robi to obtain collateral estoppel (9th Cir. 2-5, ER 140), REED does not do so but enters into a Second Settlement Agreement on December 10, 1987, approved by the Florida District Court Judge.

It was an abuse of the Court's discretion, under Federal Rule of Evidence 201(d), not to take judicial notice of the Florida Court files. The court file of the United States District Court of the Southern District of Florida Case No 84-

8324 was subject to Federal Rule of Evidence 201(d) Request to take judicial notice Mullis v. United States Bank Ct. 828 F.2d 1385, 1388 (9th Circ., 1987).

Federal Rules of Evidence 201(d) is mandatory and requires the court to take judicial notice of "adjudicative facts." Adjudicative facts are those documents that consist of court files in other lawsuits, including orders in those lawsuits, including the Florida District Court Five Platters Inc. vs Reed District Court Case 84-8324, and the bankruptcy proceeding of The Five Platters, Inc. in the Nevada Bankruptcy Court.

* * *

APPENDIX JJ

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed June 3, 1998]

No. 97-16909

D.C. No. CV95-01029-LDG

MARTHA ROBI,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
HERB REED, et al.	)
Defendant-Appellee.	)
	)

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA THE HONORABLE LLOYD D. GEORGE PRESIDING

I.

INTRODUCTION

A. Appellant Martha Robi (MARTHA ROBI) asserts that her rights in the trademark "The Platters" is superior to that of Appellee Herbert Reed (REED). REED asserts to the contrary that his rights are superior to those of MARTHA ROBI.

B. ROBI first asserts that she prevails on Appeal in that there are questions of fact (if not conclusively decided in MARTHA ROBI's favor) that REED was in privity with or had associated himself with The Five Platters, Inc. during the period 1966 to 1996, and that, based upon REED's privity with the FPI, REED's claim of rights to "The Platters" trademark, vis-a-vis ROBI, were no better than those of the Five Platters, Inc., over whom MARTHA ROBI had prevailed and had obtained a permanent injunction enjoining the Five Platters, Inc., Ram and Bennett, and those associated with the Five Platters, Inc. (including most likely Herbert REED), from taking any action, in court or otherwise to interfere or inhibit MARTHA ROBI's use of the trademark "The Platters" (CR 56-73, ER 51), affirmed by this Appellate Court in Martha Robi vs Five Platters, Inc., 918 F.2d 1439 (9th Cir. 1990) (CR-56-76, ER 54).

C. ROBI asserts that the Nevada District Court could not under any legal theory provide offensive collateral estoppel granting to REED the benefit of all of the findings which Paul and MARTHA ROBI obtained in their twenty-five (25) years of litigation against the Five Platters, Inc., especially when the sole purpose of granting REED the benefit of those rights won by ROBI was to allow REED to defeat the rights MARTHA ROBI the

court and only those portions referred to in the summary judgment memoranda." (REED's Brief at 24).[1]

2. In dispute is ROBI's Request to Take Judicial Notice and those documents accompanying that request pertaining to the Five Platters, Inc. vs. Reed Southern District of Florida Case No. 84-8324 litigation (CR 162 and CR 162-1 to 162-6, ER 126, ER 127, and ER 128).

3. Though REED asserts (Brief of REED at 15), "In sum the only materials ROBI properly placed before the district court in opposition to summary judgment appear at Tabs 92-93 (CR 97 and 98 A) and Tab 15, 32, 35, 48, and 52. (Exhibits referenced in ROBI's summary judgment opposition.)" ROBI's review of her submission to the District Court in her Opposition to Summary Judgment, Tabs 92-93 (CR 97 and 98A) indicate references to the following Tabs: 52, 53, 54, 34, 35, 70, 15, 48, 50, 66, 32, 17, 18, 70, 106.)

4. Given REED's correct citation to Local Rule 56.1 of the Nevada District Court, requiring the party to

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[1] REED is also correct in REED's citation to Local Rule 56.1 of the Nevada District Court (Brief of REED at 6 (Note 1)) which requires that "Motions for summary judgment and responses thereto shall include a concise statement setting forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue, citing the particular . . . evidence on which the party relies." Given the above, REED's position on Appeal is restricted to those issues and evidence presented in REED's specific listings of issue of fact in REED's Motion for Summary Judgment (CR 87, ER 86).

"Cit(e) the particular portion. . . of the evidence on which the party relies, that Rule as well limits REED as to what evidence REED can present "in the record," The Record on REED's Motion for Summary Judgment is limited as well to REED's Statement of Undisputed

* * *

APPENDIX KK

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed October 4, 1996]

Case No. CV-S-95-10129-LDG (LRL)

MARTHA ROBI, an individual,
Plaintiff,

v.

HERB REED, an individual, dba HERB REED and THE PLATTERS, an entity unknown; JOHN VALANO, an individual; J.P. PRODUCTIONS, an entity unknown; TONY CEE ASSOCIATES, an entity unknown; CUZIN RICHARD ENTERTAINMENT ASSOCIATES, an entity unknown; UNITED CONCERT PRODUCTIONS, a New York Corporation; THE FIVE PLATTERS) INC., a California corporation.
Defendants.

POINTS AND AUTHORITIES IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT

I.

INTRODUCTION

A. Herbert REED ("REED") has moved this Court for an Order granting Summary Judgment, among other matters,

* * *

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who himself had assigned all of his rights to "The Five Platters, Inc.," avoids that assignment which would have divested him of all trademark rights relying only upon ROBI's victories in the California State Court, and before the District Court of Calitornia, and the Ninth Circuit Court of Appeals in which ROBi obtained certain findings that "The Five Platters, Inc.," obtained the rights from ROBI unlawfully, and than the California Courts in favor of ROBI found that the assignments were deemed ineffective (REED cites to the Robi v. The Five Platters, Inc., 918 F2d 1439 (1990), the case which in which ROBi was through considerable effort and energy the victorious party).

C. What is of course totally inconsistent is that while REED wishes this Court to accept the findings of the California State Court and the District Court and the Ninth Circuit Court of Appeals with regard to some matters, REED wishes this Court to ignore specific findings from the California State and Federal Court and the Ninth Circuit Court with regard to other matters totally inconsistent with REED's claim of rights and Summary Judgment in this case.

D. Plaintiff refers this Court to the Findings of Fact and Conclusions of Law of Judge Consuelo R. Marshall

in U.S. District Court Case CV 843326 (Exhibit No. 74 at the Preliminary Injunction, admitted at that time).

E. REED argues that he has exclusive rights in that he first used the trademark. (Even though this is not set forth in the Statement of Facts at Issue).

F. Certain findings in the Federal Court Action are totally inconsistent with Herbert Reed's claims to ownership and exclusive rights of the trademark.

G. The District Court in California (upon which REED relies in finding that his assignment to "The Five Platters, Inc.," was ineffective) also found at Paragraph (10) (b) ". . . During the period 1954-1959, when the group became enormously popular, the composition of the group remained the same and included Paul Robi. The name "The Platters" was owned by the five individuals comprising the group as a partnership, and the five individuals including Robi, are the individuals in the public's mind who comprise the group 'The Platters' and were responsible for its success. . ." (This was the same finding of the Los Angeles Superior Court in 1974 which was adopted by the U.S. District Court in its findings in 1989, Exhibit No. 74 upon which Herbert Reed relies). The findings of the District Court were upheld by the Ninth Circuit in Exhibit Nos. 75 and 76 presented at the Preliminary Injunction Hearing. Robi v Five Platters, Inc., 838 F2d 318 (1988) and Robi v. Five Platters, Inc., 918 F2d 1439 (1990).

H. In that the Court found that the five (5) individuals, Paul Robi included, owned the tradename "The Platters" as a partnership, and ROBI is the successor in interest to her husband Paul Robi, REED's interest if it exists at all is that of one (1) of five (5) Platters to include Zola

Taylor who is still alive, to include Mrs. Robi, to include Helen williams and to include the Meirs of David Lynch.

I. REED assumes that the findings of the District Court as to the partnership are of no importance, and that the findings that the five (5) individuals (not REED alone) made the name famous and generated its great good will are of no importance. And REED assumed that the other findings of the Court ". . . when Robi joined the group he assisted the other Platters with musical arrangement and organized and let the groups rehearsals . . . . " was of no importance.

J. ROBI also in the Preliminary Injunction hearing put into evidence the recording contracts of the original "Platters" ROBI included Exhibit No. 8, the March 21, 1955 Contract. On the last page of the Exhibit No. 8 1955 Contract, REED, along with Rob and the other original "Platters" ". . . warrant that they (collectively) are the owners of the copyright issued in connection with the name 'The Platters'." (Herbert Reed's name is right below that of Paul Robi (Last Page Exhibit). The second Recording Contract of 1959 (Exhibit No. 52 entered into evidence at the Preliminary Injunction Hearing) at Paragraph 20, Page 8 two (2) pages before the signature page states ". . . The individuals singing the agreement comprise the vocal group known as 'The Platters' and do hereby warrant to Mercury that they are the true and lawful owners of the exclusive right to use the name 'The Platters'."

K. REED signed Exhibit No. 52 as both a member of "The Platters," and as President of "The Five Platters, Inc."

L .Now thirty-five (35) years later after REED signed two (2) recording contracts in which he agrees that the

five original individuals own the name "The Platters" jointly and equally, and after REED relies on a Court decision which finds that the name was owned by the partners, all of whom made the name famous, REED now asserts that he is the exclusive owner of the name.

* * *

[8]

that the five Platters or their heirs obtain and receive royalties from the sale of records under the 1955 and 1959 Recording Contracts.

D. Robi Suggests to the Court that REED has serious equitable difficulties, or that there are questions of fact as to these equitable and legal difficulties of REED, with regard to his claim of owning all of the partnership property, to the trademark "The Platters" as follows:

1. Did REED undertake acts inconsistent and indirectly contrary to that of the partnership, by assisting The Five Platters, Inc., to obtain the other partners interest in The Platters. Robi argues that the evidence shows that REED during the period of 1960 to 1969 undertook to assist the Five Platters Inc. in its actions against Robi against Zola Taylor, against Williams attempting to harm his partners in their use of partnership property. There is a question of fact that REED should be estopped from even asserting that he retains any partnership property in that he undertook consistent actions against his partners inconsistent with a claim to the existence of the partnership property.

2. REED apparently undertook to sign contracts with Musicor and receives Royalties from Platters recordings in which none of the Partners other then reed perform

inconsistent with his partnership obligations under Exhibits Nos. 8 and 56.

3. REED apparently appeared on behalf of "The Five Platters, Inc." against Paul Robi in the 1969 litigation asserting that Paul Robi had no rights and that he had given up his rights to the corporation "The Five Platters, Inc." "The Five Platters, Inc." sued Paul Robi in 1967 (Exhibit No. 15) and REED signed a Declaration in Support of "The Five Platters, Inc." in 1967 (Exhibit No. 48) indicating that the corporation owned the trademark and that REED had signed a new recording contract with Musicor (Exhibit No. 48, Page 4, Declaration of REED in support of The Five Platters, Inc.'s claims against Paul Robi in 1967).

4. REED was president of "The Five Platters, Inc." as late as 1969 (Exhibit No. 50 entered into evidence at the. Preliminary Injunction hearing).

5. REED was apparently enjoined by "The Five Platters, Inc.' for period of five (5) years Exhibit No. 66 entered into evidence in the Preliminary Injunction Hearing). And according to REED's own testimony, entered into an agreement in 1975 whereby was enjoined from utilized the name "The Platters" in favor of "The Five Platters, Inc."

6. As opposed to REED, Paul Robi fought "The Five Platters, Inc." from the time he left in 1962 to 1989, did not agree to an injunction and eventually prevailed against them in 1989. Robi spent hundreds of thousands of dollars in his fight against "The Five Platters, Inc." REED now asserts that all of his rights are revived as a result of Paul Robi's victory, although REED asserts that he is the sole owner and not a partner. There is question of fact as to REED's

contribution to the other partners for their efforts in their fight against "The Five Platters, Inc."

7. And there is the question of the other partners' claims against REED for his actions inconsistent with that of the partnership through putting out competitive recordings, and assisting "The Five Platters, Inc."

IV.

CONCLUSION

A. Even if one accepts the fact that REED's alleged rights are revived as a result of ROBI's victory in the California Courts, REED has not established there is no question of law as to what rights were revived. ROBI has requested REED to turn over his documentation showing his agreements with "The Five Platters, Inc.," and REED has refused to do so.

B. The very findings upon which REED relies that his rights have been reestablished also find that the trademark was owned by a partnership.

C. REED's activities may have and appear totally inconsistent over a thirty (30) year period with that of revival of his rights and a full hearing on this matter should be allowed after discovery as requested by ROBI in his Motion to continue the hearing on the Motion for Summary Judgment.

Respectfully submitted,

DATED: October 4, 1996

MAHAN AND ELLIS CHARTERED

By: /s/_____
AVIVA Y. GORDON
Attorneys for Plaintiff
MARTHA ROBI

APPENDIX LL

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed September 17, 1996]

Case No. CV-S-95-10129-LDG (LRL)

MARTHA ROBI, an individual,
Plaintiff,

v.

HERB REED, an individual, dba HERB REED AND THE PLATTERS, an entity unknown; JOHN VALANO, an individual; J.P. PRODUCTIONS, an entity unknown; TONY CEE ASSOCIATES, an entity unknown; CUZIN RICHARD ENTERTAINMENT ASSOCIATES, an entity unknown; UNITED CONCERT PRODUCTIONS, a New York Corporation; THE FIVE PLATTERS) INC., California Corporation,
Defendants.

DEFENDANTS AND COUNTERCLAIM PLAINTIFFS HERB REED, JOHN VILLANO AND JOHN P. PRODUCTIONS, INC. FOR SUMMARY JUDGMENT WITH POINTS AND AUTHORITIES

Pursuant to Fed. R. Civ. P. 56, defendants and counterclaim plaintiffs Herb Reed, John Villano ("Villano") and John P. Productions, Inc. ("JPPI") move for summary judgment in their favor and against plaintiff and counterclaim defendant Martha Robi:

* * *

[4]

POINTS AND AUTHORITIES

UNDISPUTED FACTS

More than 43 years ago, defendant Herb Reed organized, founded and named the musical group "The Platters." (HR Aff.[1] ¶ 5). Since he formed "The Platters" in 1953, Herb Reed has earned his living solely by singing and performing as "The Platters"-- the group he created. (Id. ¶ ¶ 5-92; DX[2] 1-65).

When he formed the group in 1953, The Platters were Herb Reed, Joe Jefferson, Alex Hodge and Cornell Gunther. In 1954, Jefferson and Gunther ceased performing with Herb Reed, and David Lynch and Tony Williams began performing

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[1] "HR Aff." refers to the Affidavit of Herb Reed, sworn to May 7, 1996, which was admitted at the May 14, 1996 evidentiary hearing.

[2] "DX" refers to Defendants' Exhibits attached to the Affidavit of Herb Reed and admitted at the May 14, 1996 evidentiary hearing.

with him and Alex Hodge as The Platters. After they recorded several songs together as The Platters, Zola Taylor joined them as part of the ensemble. (HR Aff. ¶¶ 5-19; DX 1-5).

Paul Robi began performing with Herb Reed as a member of The Platters in August or September 1954, when he replaced Alex Hodge. Around 1957, plaintiff Martha Robi (then using a different surname) and Paul Robi met one another. (HR Aff. ¶¶ 18-22).

Martha Robi never performed with The Platters. Martha Robi is not a musical entertainer or performer. (Id. ¶ 23).

Herb Reed is the only original member of The Platters who is still personally performing musical entertainment. (Id. ¶ 21).

* * *

[8]

Herb Reed, Villano and JPPI denied the allegations and filed a six count counterclaim against Martha Robi. Herb Reed alleges that he has exclusive rights to "The Platters" mark and, accordingly, Martha Robi is liable to him, Villano and JPPI for violations of 15 U.S.C. §1125(a), interference with contractual and prospective relations, fraudulent application and receipt of state service mark registrations, and unfair competition, deceptive trade practice and false advertising in violation of Nevada statutes and the common law.

On April 24, 1996, Martha Robi applied for a temporary restraining order and order to show cause why a preliminary injunction should not enter against Herb Reed.

This Court denied the restraining order and, on May 14, 1996, held a one-day preliminary injunction hearing.

Under oath as a witness at the hearing, Martha Robi admitted she personally did not use "The Platters" mark until 1988, that she herself is not a musical performer and has never performed under "The Platters" mark, that her former husband Paul Robi did not first perform under "The Platters" mark until August or September 1954, that she understood Herb Reed was performing with The Platters group prior to Paul Robi joining the ensemble, and that the groups she bills and promotes as The Platters have never included any of the singers associated with The Platters in the 1950s.

On August 13, 1996, this Court issued a seven page Order in which it denied Martha Robi's preliminary injunction motion. The Court concluded that "plaintiff has not demonstrated a likelihood of success on the merits." Order at 6.

* * *

[11]

County Cream. Ass'n v. Tillamook Cheese & Dairy Ass'n, 345 F.2d 158, 160 (9th Cir. 1965) ("A right to use a trademark stems from prior appropriation and use.") cert denied, 382 U.S. 903; Bell v. Streetwise Records, Ltd., 640 F.Supp. 575, 579-80 (D.Mass. 1986) ("It is settled law that ownership of a mark is established by priority of appropriation."). Common law rights can be acquired through interstate or intrastate use, and instant commercial success is not required to establish priority. Bell, 640 F.Supp at 580.

Plaintiff has not even attempted to refute Herb Reed's testimony that in 1953 he formed a musical group, named it "The Platters," began using that mark extensively in public performances and, by early 1954, had further used and commercialized the mark to the point of recording songs for Federal Records. (HR Aff., ¶¶ 5-16; DX 1-4). Martha Robi, who did not enter the United States until 1958, has never personally performed using the mark "The Platters." She obviously had nothing to do with Herb Reed's origination and use of the mark in 1953. Martha Robi did not use the mark in any respect until 1988, when she purportedly acquired Paul Robi's rights by assignment. That invalid assignment (see pages 15-16 below) did not convey priority to Martha Robi. Even assuming arguendo Martha Robi assumed Paul Robi's first use of the mark, she remains junior to Herb Reed. It is undisputed that Paul Robi's use of "The Platters" mark did not begin until August or September 1954.[5]

In sum, whether the Court considers Martha Robi's first personal performance under the mark "The Platters" (never), her first non-performance use (1988), or Paul Robi's first use (August-September 1954), she is unquestionably junior to Herb Reed (1953). Accordingly, Herb Reed has ownership of and exclusive rights to "The Platters" mark. Martha Robi has no rights to the mark. Consequently, summary judgment should enter in favor of Herb Reed (as well as Villano and JPPI) dismissing plaintiffs' complaint and for liability on the counterclaim. E.g., New West Corp., 595

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[5] At the May 14, 1996 hearing, all of the witnesses -- Herb Reed, Jean Bennett and Martha Robi herself -- testified that Paul Robi's use of "The Platters" mark did not begin until August or September 1954. (HR Aff. ¶ 18).

F.2d at 1200-1201 (affirming summary judgment under 15 U.S.C. § 1125(a) where no fact issue of priority and both parties were using an identical mark in the same market).

III. EVEN WITHOUT PRIORITY, HERB REED HAS THE RIGHT TO EXCLUDE MARTHA ROBI FROM USING "THE PLATTERS" SERVICE MARK

Even assuming arguendo that Herb Reed's clear priority is somehow not dispositive - which it is -- Martha Robi still cannot, as a matter of law, use "The Platters" mark herself or exclude Herb Reed from using his service mark.

A service mark connotes the goodwill and quality associated with a particular service. When the service mark symbolizes the personal goodwill, skill and ability of a particular individual, the mark cannot be assigned to or appropriated by another person. It is a form of fraud and consumer deception to represent a service as symbolizing the goodwill of a person who is no longer performing the service. McCarthy, Trademarks and Unfair Competition § 18.10[4] at 18-53 (Release #4, 3/95). For those reasons, "the norm in the music industry is that an artist or group generally owns its own name." Bell, 640 F.Supp. at 581.

Here, the Court is faced with a simple choice: Herb Reed, the performer who has used "The Platters" mark for the past 43 years (HR Aff. ¶¶ 5-92; DX 1-65), or Martha Robi, who has never performed and since the purported 1988 assignment has never produced a so-called "Platters" performance that included any original member of The Platters. It is absurd in the extreme for Martha Robi to claim she has rights over Herb Reed.

Even if the Court were to accept plaintiff's contention that Paul Robi, along with Herb Reed, were among the five persons who made famous "The Platters" mark, Martha Robi's claim against Herb Reed still fails. At best, under that scenario (and again ignoring Herb Reed's clear priority only for-the sake of this argument), the goodwill would have been shared personally among Herb Reed, Paul Robi, Zola Taylor, David Lynch and Tony Williams. See PX 70[6] -- Findings of Facts and Conclusions of Law in The Five Platters, Inc. v. 12319 Corp., Los Angeles Superior Court, No. C. 43926 ("The public thought of The "Platters" as the five individual performers [Herb Reed, Paul Robi, Zola Taylor, David Lynch and Tony Williams] and in the public mind, the individuals who comprised the group were responsible for its success.").[7]

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[6] PX 70 is Plaintiffs' Exhibit 70 from the injunction hearing. Copies of that document and Judge Marshall's decision dated January 9, 1989 (marked as PX 74 at the hearing) have been previsously filed with this Court. Defendants will submit additional copies if the Court so desires.

[7] Herb Reed, who was not a party to the case between Paul Robi and The Five Platters, Inc. in which the 1974 findings were made, does not concede the correctness of this finding. The correct result is that Herb Reed, as the founder of, originator of and longest-running performer with The Platters has the goodwill associated with the mark and ownership of the mark. Furthermore, Herb Reed in no way concedes that Paul Robi was one of the original Platters. In fact, the original members of the group were Herb Reed, Joe Jefferson, Alex Hodge and Cornell Gunther. Those four men performed together, appeared on television in 1954, and recorded songs together -- all as "The Platters," -- before Paul Robi joined The Platters.

Such personal goodwill cannot be assigned unless the assigning person's services remain a part of the performances. Lanham Act § 10, 15 U.S.C. § 1060; McCarthy, supra, § 18.10[4].

Here, it is undisputed that Herb Reed is the only original member of The Platters who is still performing. Paul Robi is deceased and Martha Robi has admitted that she has not employed Williams or Lynch (both of whom are deceased) or Taylor as members of the group she promotes as The Platters.[8]

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[8] In this respect, Martha Robi is just like Buck Ram, whom her husband successfully vilified for presenting a group of "Platters" which did not include any of the five persons who performed from late 1954 to 1962. In 1974, the California Superior Court found, in response to Paul Robi's request:

> The corporation [The Five Platters, Inc.] has continued to present and is presenting to the public a group called the "Platters." This group includes none of the five people who made that name famous. Plaintiff has been and is doing this with the intention of misleading the public into believing that the group it is presenting as the "Platters" is the original "Platters."

(PX 70, ¶ 10). In the posttrial decision dated January 9, 1989, Judge Marshall in the Central District of California adopted that finding of the California Superior Court (PX 74, ¶ 2.s(10) (m)), and concluded that Buck Ram's group had misled the public by using "The Platters" name without any original members (PX 74, ¶ 42).

Because Paul Robi is deceased and any personal goodwill he may have had could not be assigned as a matter of law, Martha Robi cannot rely on the purported "Assignment of Trademark."

The supposed assignment is invalid for the additional reason that it was not supported by consideration. Martha Robi testified that all she gave in return was the same support and business services to Paul Robi that she had been giving him prior to the "assignment." (Order at 3). Under the law of California, where the assignment document was allegedly executed, a promise to continue a previous obligation to the other party is inadequate consideration to support a contract obligating that other party (Paul Robi) to do more. Leonard v. Gallagher, 45 Cal. Rptr. 211, 218, 235 C.A.2d 362 (1965).[9]

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[9] Furthermore, the name of a musical group may not be assigned when, as here, the name is associated with the personal goodwill of the performers. In the present case, the goodwill of The Platters mark is associated with Herb Reed, the man who originated the mark and has performed under the mark for the past 43 years. (HR Aff. ¶¶ 5-92; DX 1-65). Martha Robi has no such association. In Marshak v. Green,746 F.2d 927 (2d Cir. 1984), the court held that a musical group's service mark was not subject to attachment because the subsequent auction of the mark would not include a transfer of the performers' goodwill. "Entertainment services are unique to the performers." Id. at 930. The suggestion that assignments might be valid if there is continuity of management or the same quality and style of music is nothing more than dicta and, in any event, is inapplicable in light of the undisputed facts that -- between Herb Reed and Martha Robi -- the goodwill of The Platters mark is associated Herb Reed (the founder and performer) not Martha Robi (the non-performing latecomer).

IV. MARTHA ROBI'S ONLY DEFENSE -- THAT HERB REED CLAIMS RIGHTS THROUGH THE FIVE PLATTERS, INC. -- IS FATALLY DEFECTIVE, BOTH FACTUALLY AND LEGALLY

Tacitly acknowledging the hollowness of her claim to exclude the originator and senior user of "The Platters" mark, Martha Robi has attempted to tar Herb Reed with the adverse judgments against The Five Platters, Inc., arguing that he claims his rights through that alleged corporation. Plaintiff's claim is absolutely false and all evidence is to the contrary. In 1969, Herb Reed disassociated himself from Buck Ram and The Five Platters, Inc. (HR. Aff. ¶ 45; DX 25). Thereafter, Herb Reed and The Five Platters, Inc. were adversaries, litigating against one another. Notwithstanding a limited preliminary injunction and alleged settlement agreement, [10] Herb Reed continued to perform using "The Platters" mark from 1969 to the present. (HR Aff. ¶¶ 45-92; DX 26-65).

Moreover, both the California Superior Court and federal court for the Central District of California have ruled that The Five Platters, Inc. was a sham corporation and that its so-called stock was issued illegally to Herb Reed, Paul Robi, Zola Taylor, Tony Williams and David Lynch:

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[10] Under the November 1987 settlement agreement between The Five Platters, Inc. and Herb Reed, he conditionally agreed not to use the name "The Platters" by itself unless The Five Platters, Inc. was found to have no such rights in such name. In fact, in January 1989, the federal court in California determined that The Five Platters, Inc. has no rights in the name "The Platters" (PX 74), a decision affirmed by the Ninth Circuit in 1990 Robi 918 F.2d at 1443-46.

In January 1956, the plaintiff corporation [The Five Platters, Inc.] was formed by a lawyer selected by Buck Ram. Shortly thereafter, defendant Paul Robi, and the other members of the group [Herb Reed, Zola Taylor, David Lynch and Tony Williams], executed employment contracts with the corporation by which purportedly the rights to the name the "Platters," were transferred to the corporation in return for the corporation's stock. The corporate stock was thereafter issued to the members of the group. This stock issue was illegal and void in that it did not comply with the terms of

* * *

APPENDIX MM

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CR 1	October 26, 1995, Complaint of Plaintiff, Martha Robi (pp. 1-13) (without Exhibits. Exhibits to the Complaint were put into evidence at the Preliminary Injunction hearing and are prior District Court and Ninth Circuit decision and are a matter of judicial notice.)	1
CR 7	December 20, 1995, REED'S Motion and Memorandum to Dismiss for Improper Venue (pages 1-8 and signature page (21) only)	2
CR 8B	December 18, 1995, Affidavit of Defendant, REED in Support of Motion to Change Venue (with Exhibits Ex. F, the Reed v. Robi N.Y. Complaint, pp. 1-5 only)	3

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CR 33	April 19, 1996, Declaration of Stanley Jay Blitz	5
CR 37	April 26, 1996, Minutes of the District Court setting a one-day hearing for a Preliminary Injunction	6
CR 56	May 14, 1996, Minutes of the Court, Hearing on Preliminary Injunction held May 14, 1996	7
CR 56-1	Preliminary Injunction Hearing ("PIH"), Ex. No. 1, 1954 Photo of "The Platters"[1]	8

[1] The Preliminary Injunction exhibits admitted at the one (1) day Preliminary Injunction Hearing ("PIH") on May 14, 1996 are identified by separate Tab No. The number associated with an exhibit admitted at the Preliminary Injunction hearing CR 56, i.e.,

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CR 56-18	PIH, Ex. 18, November 21, 1972, Complaint for Damages and an Injunction, The Five Platters, Inc. v. 12319 Corp., Paul Robi, Los Angeles Superior Court Case No. C43926	16
CR 56-19	PIH, Ex. 19, November 14, 1974, Findings of Fact and Conclusions of Law, The Five Platters, Inc. v. 12819 Corp. and Robi, Los Angeles Superior Court, Case No. C43926	17

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